The Central Law Journal.

ST. LOUIS, DECEMBER 21, 1888.

CURRENT EVENTS.

OUR INDEX NUMBER.—Our next number (index) will be the last number of this volume. This number will bear date December 28, 1888, but as its preparation requires much more time and labor than an ordinary number, it will not probably be issued on that day, but a few days thereafter. If, therefore, any of our subscribers observe that the last number is not received on the accustomed day, let them not mourn as those who have no hope, for it will assuredly be soon forthcoming.

CHRISTMAS COMES BUT ONCE A YEAR — more's the pity—is undoubtedly the comment, express or implied, of all the youths of Christendom, and of many children of a larger growth. We, although in the "sere and yellow leaf," are in full sympathy with our juniors, and have tender recollections of alas! too many by-gone festivals.

As before the issuance of another number of this JOURNAL will occur this great anniversary which binds together all Christians of all lands, tongues, kindred and people, we take this occasion to tender to all our subscribers, and especially to their olive branches, the compliments of the season, wishing them each and all a "Merry Christmas," and many happy returns of the day.

THE BIRMINGHAM HORROR LYNCH LAW.—We presume that all of our readers have seen in the newspapers full accounts of the deplorable occurrences which have recently taken place at Birmingham, Ala. We do not propose to recite the melancholy details of this tragedy, but for our present purpose it is sufficient to say that an atrocious crime was committed, that the culprit was in the custody of the officers of the law, that an attempt was made by citizens to rescue him for purposes of immediate vengeance, and that a conflict ensued in which a number of lives were lost.

We think the occasion suitable to renew our protest, not only against the "wild justice of revenge," which is dignified by the title of "lynch law," but also against the inexcusable delay and inefficiency in the administration of criminal law, which, in the opinion of many people, palliate, and even justify such contempt of social order and the majesty of the law.

When resistance to the law is inaugurated no one can foretell its extent or duration, what will be the consequences, nor who will be the sufferers. It is clearly the duty of legislatures to provide for the severe and condign punishment of those who attempt to take the law into their own hands, and not less imperative is the duty to withdraw the temptation to commit this offense by punishing promptly, certainly and severely, crimes which are likely to provoke popular vengeance. To the shame of the administration of criminal law in many of our States, it must be said that neither one nor the other of these things is effectually accomplished. Rarely, indeed, are the instigators of a riot, in which human life is lost, brought to deserved punishment, and equally rare are the cases in which atrocious criminals are brought to justice, except after long delays and innumerable opportunities of escaping deserved retribution by reason of the casualties incident to those delays. In a large majority of such cases the delays acquit, and justice is put to open shame.

While this state of things continues no sane man can wonder that, when horrible crimes shock the sensibilities of whole communities and rouse them to frenzy, the lawless and the thoughtless do not hesitate, in defiance of the constituted authorities, to wreak vengeance upon the wretches who, in popular estimation, have forfeited their lives by the commission of those crimes. In such cases legislators and courts must needs perceive a divided duty. Justice to the accused imperatively requires that he shall have a fair trial and every reasonable facility for establishing his innocence. On the other hand, it is no less essential to the dignity of the law and the security and good order of the community that crime should be punished, and especially that atrocious crimes should be *promptly*, as well as certainly and severely punished.

It is but too evident to all who read our criminal codes and our reports of criminal trials that, in most of the States, the administration of the law is far too lax, that justice leans far too much to mercy's side, and that too many and too long delays are permitted to intervene between the arrest of the defendant and the final decision of the case. One, two, three, even four years, are often allowed to elapse before the final trial.

We deprecate and protest against both these evils, but we think that the delays of justice, reprehensible as they are, do not in the slightest degree palliate or excuse the contempt of law and order which prompt men to the commission of deeds of violence and actual murder. The delay of justice is certainly a weakness, but is entitled to charitable consideration, as it is often prompted by motives of humanity.

NOTES OF RECENT DECISIONS.

MISSOURI LAND TITLES—FRENCH AND SPANISH GRANTS—MISSOURI COMPROMISE—SCHOOLS—SIXTEENTH SECTION.—Within a few days past the Supreme Court of the United States decided a case which is venerable for its antiquity, being no less than thirty-five years old, and notable as the latest of a series of decisions involving the title to land in Missouri, held or claimed under the governments of France and Spain.

The suit was commenced in 1853. The plaintiff, Glasgow, suing on behalf of the school board, sought to recover possession of a tract of land, now of great value, lying within the city of St. Louis, and being part of the sixteenth section under the surveys authorized by the United States. It was contended on behalf of the plaintiff that, under the act of congress of 1820, known as the Missouri Compromise Act, the sixteenth section in each township of public lands was devoted to common schools, and, therefore, that he was entitled to recover.

For the defendants, it was insisted that the land in controversy was not, in 1820, public land or the property of the United States at all; that it was then private property, and had been for more than seventeen years.

It will be remembered that in 1800 Spain ceded to France the province of Louisiana, which included Missouri; that in 1803 France ceded it to the United States, and in both treaties the grantee engaged to protect the rights of the inhabitants. In fulfillment of this duty congress, between 1803 and 1812, enacted several statutes and appointed several boards, and in the latter year passed a comprehensive act confirming the titles of all persons who, on December 20, 1803, held possession of land, claiming it under the authority of either France or Spain. Defendants claim title under this act, alleging that their ancestor, Peter Lindell, in 1827, purchased the land in controversy from parties who held it in 1803, under color of title from France or Spain. The supreme court has, in several cases,[1] decided that titles to land confirmed by the act of congress of 1812, were valid, and were not abrogated by the Missouri compromise of 1820; so that all the defendants had to do was to show by sufficient evidence that their title was among those French and Spanish titles which were confirmed by the act of 1812. This, after many years of litigation and several adverse decisions, they have succeeded in doing to the satisfaction of the court of last resort.

[1] Guitard v. Stoddard, 16 How. 494; Milburn v. Hortiz, 1 Black (U. S.), 595.

CORPORATION — DISSOLUTION — CONSTITUTIONAL LAW—TRUST—DIRECTORS—TRUSTEES.—We learn from a newspaper paragraph that the New York Court of Appeals has recently decided a rather novel case, involving the law of corporations, and the consequences which follow the dissolution of those bodies by judicial decree.

It seems that the attorney-general of the State instituted, on behalf of the State, proceedings against the Broadway Surface Railway Company, which resulted in a decree dissolving that corporation.

It appears that the legislature of the State transferred some of the assets of the defunct corporation to the city, and the question arose whether its action in this respect was constitutional. The newspaper report is not full, and does not set forth all the facts. It is in the following words:

"The court held that the dissolution of the company did not involve the forfeiture of its

franchises, but that these survived and passed, on the dissolution of the company, to its directors, as trustees for the creditors and stockholders, until some competent court should appoint a receiver, and that the legislature acted in violation of constitutional rights of property in attempting to transfer some of the company's assets to the city. The court said that the dissolution of a corporation has not, naturally, any other effect upon its contracts or property rights than the death of a natural person has upon his. In condemning the legal view set up by the attorney-general, the court expressed itself in unmistakable terms. It said: 'The contention that securities representing a large part of the world's wealth are beyond the reach of the protection which the constitution gives to property, and are subject to the arbitrary will of successive legislatures to sanction or destroy at their pleasure or discretion, is a proposition so repugnant to reason and justice, as well as the traditions of the Anglo-Saxon race, in respect to the security of rights of property, that there is little reason to suppose that it will ever receive the sanction of the judiciary, and we desire in unqualified terms to express our disapprobation of such a doctrine.' "

We shall look forward with some curiosity to the full report of the case, as we cannot very clearly perceive grounds upon which the legislature acted, nor why the Court of Appeals should have found it necessary to decide so very plain a proposition.

FOREIGN JUDGMENTS.

1. Classes of Foreign Judgments.
2. Judgment *in rem*.
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4. Judgments in the Courts of Sister States.
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6. Judgments where Court has no Jurisdiction.
7. Attacking Foreign Judgment.
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9. Denying Authority of Attorney to Appear.
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11. Privileges and Priorities of Foreign Judgments.
12. Tendency of Decisions to Restrict Foreign Judments.
13. Conclusiveness of Foreign Judgments.
14. Pendency of Suit in Another State.

1. *Classes of Foreign Judgments.*—Foreign judgments are either *in rem* or *in personam*.[1]

In order that a judgment may be valid and entitled the recognition of foreign tribunals, it is indispensable that the court pronouncing the judgment should have a lawful jurisdiction over the case, over the subject of the action, and over the parties to the action; that the court had such jurisdiction must be clearly shown;[2] and if the jurisdiction fails in either of these respects the judgment will be a nullity, without obligation and not entitled to be respected or enforced beyond the jurisdiction of the court rendering it, whether the judgment be *in rem* or *in personam*.[3]

But if the judgment of a foreign court contravenes the *lex loci*, it will not be treated as conclusive in the courts of the State or country whose laws have been disregarded.[4]

Vattel says that it is the province of every sovereignty to admininister justice in all places within its own territory and under its own jurisdiction, to take cognizance of the crimes committed there and by the contro-

[1] Story Confl. L. § 584. See also 3 Burge, Com. on Col. & For. Law, pt. 2, ch. 24, pp. 1014 to 1080; 2 Smith, Lead. Cas. (2d ed.) 436, note. Some divide judgments into three classes, to-wit: (1) *in rem*, (2) *in personam*, and (3) mixed, *in rem* and *in personam*. See Burgundus, Tract. 3, n. 1, 2, pp. 84-85; 1 Boullenois, obs. 25, p. 602. Lord Kames in his work on Equity (see 2 Kames, Eq. (3d ed.) 365), makes another distinction as to foreign judgments, namely: "suits sustaining and suits dismissing a claim." He says: "A foreign suit sustaining the claim is not one of those universal titles which ought to be made effectual everywhere. It is a title that depends on the authority of the court whence it issued, and therefore has no coercive authority *extraterritorium*." But this seems to be a refinnement of distinctions not warranted by the ancient common law and not sanctioned by the modern decisions. See Gelston v. Hoyt, 13 Johns. (N. Y.) 561; Gelston v. Hoyt, 3 Wheat. 246; The Bennet, 1 Dodson, 175-180; Starkie, Ev. pt. 2, § 80.

[2] Smith v. Mutual Life Ins. Co., 14 Allen (Mass.), 339; Ferguson v. Mahon, 11 Ad. & El. 179-182-183; 1 Boullenois obs. 25, pp. 618-620. The judgment of a competent Spanish court, having jurisdiction of the case, made after the cession of Louisiana, but whilst the country though ceded was *de facto* in the possession of Spain, and subject to Spanish law, has been held to be valid, so far as it affects the private rights of the parties. Keene v. McDonough, 8 Pet. 308.

[3] Rose v. Himely, 4 Cr. (U. S.) 269-270; Andrews v. Herriot, 4 Cow. (N. Y.) 524 n; Shumway v. Stillman, 6 Wend. (N. Y.) 447; Noyes v. Butler, 6 Barb. (N. Y.) 613; Middlesex Bank v. Butman, 29 Me. 19; Hall v. Williams, 6 Pick. (Mass.) 232; s. c., 17 Am. Dec. 356; Woodward v. Tremere, 6 Pick. (Mass.) 354; Bissell v. Briggs, 9 Mass. 462; s. c., 6 Am. Dec. 88; Buchanan v. Rucker, 9 East, 192; Don v. Lippmann, 5 Clark & Finn. 1-20-21; Cavan v. Stewart, 1 Stark. 525; Ferguson v. Mahon, 11 Ad. & El. 179-182-183, 1 Stark. Ev., pt. 2, p. 214, § 68; Henry on For. Law, 18 n; *Id.* 23-73; Story, Confl. L. §§ 539-546-547-586.

[4] Dias v. Morrell, 2 U. S. Law Mag. 431; Lorellhe v. Dias, 2 U. S. Law Mag. 433.

versies that arise within it, and says that, in consequence of this right of jurisdiction, the decision made by the judge of the place within the extent of his authority ought to respected, and take effect even in foreign countries.[5] But this doctrine has not been generally accepted.[6]

2. *Judgments in rem.*—Where the matter in controversy is immovable property, as land, the judgment pronounced in the *forum rei sitæ* is of universal obligation as to all matters or right and title which it professes to determine; but a foreign judgment relating thereto will be of no obligation.[7] And the same principle applies to all proceedings *in rem* against movable property within the jurisdiction of the court pronouncing the judgment.[8] But the judgment must be *bona fide* and without fraud, for if fraud intervenes it will avoid the force and validity of the judgment, however well founded the jurisdiction.[9]

[5] Vattel, B. 2 ch. 7, §§ 84-85.

[6] See Story Confl. L., § 586.

[7] See Cammell v. Sewell, 5 H. & N. 728; Rafad v. Vereist, 2 Wm. Black. 1058; Story, Confl. L. §§ 362, note 3, 532-545-551-591; 1 Boullenois, obs. 25, pp. 618-619-623; 1 Hertii Opera, de Collis, § 4, n. 73, pp. 153-154; J. Voet, ad. Pand, Tom. 1 lib. 42, tit. 1, n. 41, p. 288.

[8] French v. Hall, 9 N. H. 137; s. c., 32 Am. Dec. 341; Croudson v. Loenard, 4 Cr. (U. S.) 434; Gelston v. Hoyt, 3 Wheat. (U. S.) 246; Williams v. Armroyd, 7 Cr. (U. S.) 423; Rose v. Himely, 4 Cr. (U. S.) 241; Hudson v. Guestier, 4 Cr. (U. S.) 293; The Mary, 9 Cr. (U. S.) 126-142-146; Bradstreet v. Neptune Ins. Co., 3 Sumner C. C. 600; s. c., 2 Law. Rep. 262-264-265; Peters v. The Warren Ins. Co., Sumner C. C. 389; s. c., 1 Law Rep. 222; Magoun v. New England Ins. Co., 1 Story C. C. 157; s. c., 3 Law Rep. 127-130-131; The Mary Anne, Ware (U. S.) 104; Whitney v. Walsh, 1 Cush. (Mass.) 29; s. c., 47 Am. Dec. 590; Barrow v. West, 23 Pick. (Mass.) 270; Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 179; Andrews v. Herriot, 4 Cow. (N. Y.) 520, and n.; Grant v. McLachlin, 4 Johns. (N. Y.) 34; Blad v. Bamfield, 3 Swanst. 604-605; Cartrege v. Imrie, L. R. 4 H. L. 414; Harmer v. Bell, 7 Moore, P. C. 267; s. c, 22 Eng. L. & Eq. 62.

[9] Magoun v. The New England Ins. Co., 1 Story C. C. 157; s. c., 3 Law Rep. 127-130-131; Bradstreet v. The Neptune Ins. Co., 3 Sumner C. C. 600; s. c., 2 Law Rep. 262-264-265; Duchess of Kingston's Case, 11 State Trials, 261-262; s. c., 20 Howell, State Trials, 355-538 note; Bowles v. Orr, 1 Younge & C. 464; Starkie, Ev. pt. 2, §§ 77-79-83; Harg. Law Tracts, 449-479-483. It must appear that the proceedings upon which the judgment is founded were regular, and that the parties interested *in rem* had notice of the proceedings and an opportunity to appear and defend their interests, either personally or by representative, before the judgment was pronounced. Bradstreet v. The Neptune Ins. Co., 3 Sumner, 600; s. c., 2 Law Rep. 263; Magoun v. New England Ins. Co., 1 Story C. C. 157; s. c., 3 Law Rep. 127-130; Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 180; Sawyer v. Maine Fire & Marine Ins. Co., 12 Mass. 291.

But fraud practiced in the recovery of a judgment cannot be pleaded in an action thereon brought in another State, unless such a defense could be made in the courts of the State where the judgment was rendered.[10]

Proceedings by a creditor against the personal property of a debtor in the hands of a third person, or against debts due to him by such third person, are treated as in some sense proceedings *in rem*, and are regarded as entitled to the same consideration as proceedings *in rem*.[11] In such cases, the existence of the property seized or the debt garnished within the territory constitutes just grounds of proceeding to enforce the rights of the plaintiff and discharge his debt, at least so far as the property or debt will do so.[12] If the defendant does not appear in the suit, the proceedings will be regarded as a proceeding *in rem* and the judgment will bind the property or debt, but not be binding upon the debtor as a decree *in personam* would be.[13]

Such judgments are held conclusive, in

[10] Barras v. Bidwell, 3 Woods C. C. 5. A bill in equity for an injunction against the use in one State of a judgment rendered in another State, cannot be maintained on the ground that the judgment was obtained by false and fraudulent testimony. Metcalf v. Gilmore, 59 N. H. 417; s. c., 47 Am. Rep. 217.

[11] See Bissell v. Briggs, 9 Mass. 468; s. c., 6 Am. Dec. 88; Ocean Ins. Co. v. Portsmouth Marine Ry. Co., 3 Met. (Mass.) 420; Danforth v. Penny, 3 Met. (Mass.) 564; 3 Burge, Comm. on Col. & For. Law, pt. 2, ch. 24, pp. 1014-1019. To make any judgment effectual the court must possess and exercise the rightful jurisdiction over the *res*, and also over the person, at least so far as the *res* is concerned, for otherwise it will be disregarded. If the jurisdiction be well founded over the *res* but not over the person, except as to the *res*, the judgment will not be either conclusive or binding upon the party *in personam*, although it may be in *rem*. Story Confl. L. § 592*a*. Respecting the attachment of wages in a foreign State: See Burlington & M. R. R. Co. v. Thompson, 31 Kan. 180; s. c., 47 Am. Rep. 497; Gilbert v. Black, 1 Leg. Chron. 132; Wilson v. Joseph (Ind.), 5 West. Rep. 681; Stevens v. Brown, 20 W. Va. 450; Mooney v. Union Pac. R. R. Co., 60 Iowa, 346; The City of New Bedford, 20 Fed. Rep. 57.

[12] Story, Confl. L. § 549.

[13] See Ewer v. Coffin, 1 Cush. (Mass.) 24; s. c., 48 Am. Dec. 581; Rangely v. Webster, 11 N. H. 299; McVicker v. Beedy, 31 Me. 317; s. c., 50 Am. Dec. 666; Phelps v. Holker, 1 Dall. (U. S.) 261; Kilburn v. Woodworth, 5 Johns. (N. Y.) 37; s. c., 4 Am. Dec. 321; Robinson v. Ward, 8 Johns. (N. Y.) 86; s. c., 5 Am. Dec. 327; Pawling v. Bird's Exrs., 13 Johns. (N. Y.) 192; Bissell v. Briggs, 9 Mass. 462; s. c., 6 Am. Dec. 88; 3 Burge Comm. on Col. & For. Law, pt. 2, ch. 24, pp. 1016-1019. Compare Taylor v. Phelps, 1 Harr. & G. (Md.) 492; Shumway v. Stillman, 6 Wend. (N. Y.) 447; Douglas v. Forrest, 4 Bing. 686-702-703; 1 Boullenois, obs. 25, pp. 609-610-619-620-622-623-624-628.

England, not only *in rem*, but also as to all the points and facts which are directly or incidentally decided;[14] but in the United States the rule is not uniform, some of the States holding that they are conclusive only *in rem*, and may be controverted as to all the incidental grounds and facts on which they profess to be founded, while others follow the English courts.[15]

3. *Judgments in Personam.*—It is said that a sovereign is not bound *jure gentium* to execute any foreign judgment within his dominions, and that if execution of such an one is sought in his dominions, he is at liberty to examine into the merits of the judgment and refuse to give it effect where it appears unjust and unfounded.[16] It is otherwise, however, where a foreign judgment is set up as a bar to an action.[17]

According to the doctrine of the American courts, where a judgment rendered by a foreign court in favor of the plaintiff is relied upon as a bar, it seems that if the foreign tribunal had no jurisdiction of the person of the defendant, a judgment there in favor of the plaintiff would not merge the original cause of action so as to defeat an action in another State upon the same cause.[18] But if the court had full jurisdiction of the person of the defendant, a judgment for the plaintiff therein is a bar to a suit upon the original cause of action in another State of the Union.[19] The English courts, however, apply the rule even to cases where the court had full jurisdiction over the parties.[20]

This distinction has been frequently recognized by the courts, and is regarded "as having a just foundation in international justice."[21]

But according to the present doctrine in England when the plaintiff has recovered a judgment in a foreign country upon an original cause of action, he may sue either upon the judgment thus obtained or upon the original cause of action, the court there holding that such cause of action is not merged in the judgment thus obtained.[22]

Whether the effect of a foreign judgment is a merger of this cause of action so as to defeat a recovery in another State upon the same cause of action, where the suits were commenced simultaneously, will depend upon the effect, force, and validity of such judgment in the State where rendered.[23]

There was formerly a disposition among American courts to regard *ex parte* judgments obtained on attachment of the debtor's property, and publication of notice, as not wholly void as to the person of the non-appearing defendant.[24] But the better opinion, and the one that prevails in the federal and State courts, seems to be that foreign judgment where the defendant did not appear and the

[14] Blad v. Bamfield, 3 Swanst. 604; Tarleton v. M. & S. 20.

[15] See Maley v. Shattuck, 3 Cr. (U. S.) 488; Gelston v. Hoyt, 3 Wheat. (U. S.) 246; Peters v. Warren Ins. Co., 3 Sumner C. C. 389; s. c., 1 Law Rep. 281; Andrews v. Herriot, 4 Cow. (N. Y.) 522 note; Vandenheuvel v. United Ins. Co., 2 Cain. Cas. (N. Y.) 217; Vandenheuvel v. United Ins. Co., 2 Johns. Cas. (N. Y.) 451; s. c., 1 Am. Dec. 180; Robinson v. Jones, 8 Mass. 536; s. c., 5 Am. Dec. 114; 2 Kent Comm. 120-121.

[16] 2 Kent Com. 119-120; Story, Conf. L., §§ 598-611-618; 1 Boullenois, obs. 25, p. 601.

[17] Where a judgment has been pronounced by a competent court and carried into effect, the matter then becomes *res judicata*, and the losing party has no right to institute a new suit elsewhere for the litigation of the same question. 2 Kent Com. 119-120; Story, Conf. L. § 598.

[18] Middlesex Bank v. Butman, 29 Me. 19; McVicker v. Beedy, 31 Me. 314; s. c., 50 Am. Dec. 666; Rangely v. Webster, 11 N. H. 299; Whittier v. Wendell, 7 N. H. 257; Kane v. Cook, 8 Cal. 449; Barnes v. Gibbs, 2 Vroom (N. J.), 317; Rogers v. Odell, 39 N. H. 457; North Bank v. Brown, 50 Me. 214; s. c., 79 Am. Dec. 609; Baxley v. Linah, 16 Pa. St. 241; s. c., 55 Am. Dec. 494.

[19] See Bank of North America v. Wheeler, 28 Conn. 433; s. c., 73 Am. Dec. 683; Cleaves v. Lord, 43 Me. 290; Baxley v. Linah, 16 Pa. St. 241; s. c., 55 Am. Dec. 494; Child v. The Eureka Powder Works, 45 N. H. 547; North Bank v. Brown, 50 Me. 214; s. c., 69 Am. Dec. 609; Bank of United States v. Merchants' Bank, 7 Gill (Md.), 415; Curtiss v. Beardsley, 15 Conn. 523; McGilvray v. Avery, 30 Vt. 538.

[20] Story, Conf. L. § 599*b*.

[21] See Taylor v. Phelps, 1 Harr. & G. (Md.) 492; Griswold v. Pitcairn, 2 Conn. 85; Rangely v. Webster, 11 N. H. 299; Burnham v. Webster, 1 Wood & M. 174; Tarleton v. Tarleton, 4 M. & S. 20; Burrows v. Jemino, 2 Str. 733; s. c., Cas. T. Hard. 87; Boucher v. Lawson, Cas. T. Hard. 80; 2 Swanst. 326 n; Philips v. Hunter, 2 H. Black. 410; Erskine, Inst., B. 4. tit. 3, § 4; 2 Kent Com. 119-120; Story, Conf. L. § 598.

[22] Bank of Australasia v. Harding, 9 C. B. 661; Bank of Australasia v. Nias, 16 Q. B. 717; Smith v. Nicolls, 5 Bing. (N. C.) 208-221-224; Hall v. Odber, 11 East, 118; Reimers v. Druce, 23 Beav. 149. If on an action in a foreign country a judgment in favor of the plaintiff does not merge the original cause therein, why should a judgment in favor of the defendant have that effect? See Story Conf. L. § 599*a*.

[23] McGilvray v. Avery, 30 Vt. 53; Reed v. Girty, 6 Bosw. (N. Y.) 567.

[24] Mills v. Duryee, 7 Cr. (U. S.) 481; Hampton v. McConnel, 3 Wheat. (U. S.) 234; Lapham v. Briggs, 27 Vt. 26; Bank of North America v. Wheeler, 28 Conn. 433; s. c., 73 Am. Dec. 683.

court had no jurisdiction over his person, are void.[25]

4. *Judgments in Courts of Sister States.*—By the provisions of the federal constitution,[26] it is required that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and an act of Congress.[27] Supplementary to the provisions of the constitution declares that the judgments of State courts shall have the same faith and credit in other States as they have in the State where they were rendered. It has accordingly been held that the decree or judgment in a court of competent jurisdiction of a sister State has the same credit, validity, and effect in the courts of another State that it has in the State where it was rendered;[28] but that the question of jurisdiction of the court rendering such judgment is always open,[29] as is also the question of vitiating fraud.[30]

These provisions put such judgments on the same footing as domestic judgments; otherwise they would be regarded as foreign judgments.[31]

5. *Judgment in Federal Courts.*—The same rule applies to judgments of circuit courts of the United States, when relied upon in a State court, as governs the judgments of courts of sister States.[32]

6. *Judgments where Court had no Jurisdiction.*—The United States constitution, requiring full faith an credit to be given in each State to the judicial proceedings of every other State, applies only where the court whose judgment is invoked had jurisdiction; and a finding or recital of such jurisdiction will not prevent inquiry;[33] and judgments rendered by the court of a foreign State without having acquired jurisdiction of the case and of the person of the defendant, are still to be regarded as foreign judgments when attempted to be enforced beyond the limits of the State when rendered.[34]

[25] D'Arcy v. Ketchum, 11 How. (U. S.) 165; Webster v. Reid, 11 How. (U. S.) 437; Hall v. Williams, 6 Pick. (Mass.) 232: s. c., 17 Am. Dec. 356; Kilburn v. Woodworth, 5 Johns. (N. Y.) 37; s. c., 4 Am. Dec. 321; Bissell v. Briggs, 9 Mass. 462; s. c., 6 Am. Dec. 88. Where A, of Vermont, sued B, of Vermont, and C, of Louisiana, in New Hampshire, and service was had by publication, and real estate attached, and defendants were defaulted without appearance, but the property attached did not satisfy the judgment, it was held, that the cause of action was not merged in the New Hampshire judgment so as to prelude A from maintaining a suit in Vermont upon the original cause of action. St. Johnsbury Bank v. Peabody, 55 Vt. 492; s. c., 45 Am. Rep. 632.

[26] Article 3, § 4.

[27] Act of Congress of May 26, 1790, ch. 11; Story on Const. ch. 29, §§ 1297-1307.

[28] Pittsburg & St. L. R. R. Co. v. Rothschild (Pa.), 4 Cent. Rep. 109. See Phillips v. Godfrey, 7 Bosw. (N. Y.) 150; McFarland v. White, 13 La. Ann. 394; Barney v. Patterson, 6 Harr. & J. 182. Under United States constitution, article 4, section 1, and the Act of Congress of May 26, 1790, a writ of error, not operating as a *supersedeas* from the Supreme Appellate Court of Texas to a judgment of a district court of that State, will be regarded as having the same effect in Virginia as in Texas. Piedmont & Arlington Life Ins. Co. v. Ray, 75 Va. 821. If a *scire facias* would lie upon a judgment in the State in which it was rendered, an action of debt will lie upon it in another jurisdition. Simonton v. Barrell, 21 Wend. 362. And a judgment of a court of common pleas of a county in another State, in the absence of evidence to the contrary, is to be regarded as a judgment of a court of general jurisdiction, and is entitled to every presumption in favor of its validity and regularity. Pringle v. Woolworth, 90 N. Y. 502.

[29] Pittsburg & St. L. R. R. Co. v. Rothchild (Pa.), 4 Cent. Rep. 109.

[30] See Gleason v. Dodd, 4 Metc. (Mass.) 333; Ewer v. Coffin, 1 Cush. (Mass.) 23; s. c., 48 Am. Dec. 587; Carleton v. Bickford, 13 Gray (Mass.), 591; s. c., 74 Am. Dec. 652; Folger v. Columbian Ins. Co., 99 Mass. 273; Taylor v. Bryden, 8 Johns. (N. Y.) 73; Cummings v. Banks, 2 Barb. (N. Y.) 602; Davis v. Smith, 5 Ga. 274; s. c., 40 Am. Dec. 279; D'Arcy v. Ketchum, 11 How. (U. S.) 165; Pearce v. Olney, 20 Conn. 544; Rogers v. Gwinn, 21 Iowa, 58. However, there are numerous well-considered cases which deny the right to attack the judgment of a sister State on the ground of fraud. See Sanford v. Sanford, 28 Conn. 6, 28; McRae v. Mattoon, 13 Pick. (Mass.) 53; Bicknell v. Field, 8 Paige Ch. (N. Y.) 440; Christmas v. Russell, 72 U. S. (5 Wall.) 290; bk. 18 L. ed. 475.

[31] See Dorsey v. Maury, 10 Smed. & M. 298; Seevers v. Clement, 28 Md. 426; Buckner v. Finley, 2 Pet. (U. S.) 586; Smith v. Lathrop, 44 Pa. St. 326.

[32] See Barney v. Patterson, 6 Harr. & J. (Md.) 182; Niblett v. Scott, 4 La. Ann. 246.

[33] Thompson v. Whitman, 18 Wall. (85 U. S.) 457; bk. 21 L. ed. 897; Pennoyer v. Neff, 95 U. S. 714; bk. 24 L. ed. 565; Sewall v. Sewall, 122 Mass. 156; Kerr v. Kerr, 41 N. Y. 272; Hoffman v. Hoffman, 46 N. Y. 30.

[34] D'Arcy v. Ketchum, 11 How. (U. S.) 165. Mr. Edmund H. Bennett criticises the doctrine of D'Arcy v. Ketchum, because, as he alleges, it "might seem to imply that the record when presented was liable to contradiction upon any question affecting the jurisdiction of the court." He adds: "But as no such doctrine has yet been declared by that court, we should hesitate to believe they will ever come to a result which we regard so much at variance with well established general principles. For in order to admit evidence to contradict the recitals of the record, we are obliged to adopt a rule of presumption precisely opposite to that which we apply in ordinary judgments; we have to make every possible presumption against their conclusiveness, and virtually treat them all as foreign judgments, until the contrary is established to the satisfaction of a jury. If this rule is to be generally recognized, there will be no judgment from any of the American States, when attempted to be enforced in

Thus, when the fact of divorce is sought to be proved by the record of a decree in another State, the decree may be questioned for want of jurisdiction apparent on the record.[35] And it has been held that a decree for the removal of a cloud upon a title, being a decree *in personam*, can only be supported, against one not a citizen or resident of the State in which the decree is rendered, by actual service within the jurisdiction; hence, where such a decree is rendered by a State court against a non-resident upon a constructive service by publication, it is without jurisdiction, and affords no bar to a suit to recover the land brought in the federal court of the district embracing the State.[36]

7. *Attacking Foreign Judgments.*—Where a judgment is sought to be enforced in the courts of a sister State the defendant may not show that the judgment was founded on a mistake, either of law or of fact.[37] Neither will the fact that in the State where a foreign judgment is sought to be enforced the cause was barred by the statute of limitations when the suit upon which the judgment was obtained was brought, avail as a defense.[38] And foreign judgment are said to be binding although proceedings are pending, but not decided, in the courts of the State where rendered to annul and set them aside.[39]

any other of the States where it will not be practicable by proper pleas to draw the validity of the whole judgment into controversy before the jury, and thus virtually nullify the provisions of the United States constitution and the acts of Congress in their favor. * * * * We perceive no necessity for the adoption of any such rule of construction in regard to this class of judgments. All that is required to protect the rights of debtors or defendants in such cases, is to hold such judgments of no validity, unless acquiesced in by the defendant, until it appears by the record of such judgment that the court had jurisdiction both of the subject-matter and of the parties; and then treat the record as conclusive, the same as that of any domestic judgment." See Bennett's Edition of Story's Conf. L. § 599*f*.

[35] Morey v. Morey, 27 Minn. 265.

[36] Hart v. Sansom, 110 U. S. 151; bk. 28 L. ed. 101.

[37] Hassell v. Hamilton, 33 Ala. 280; Rocco v. Hackett, 2 Bosw. (N. Y.) 579; Milne v. Van Buskirk, 9 Iowa, 558; Scott v. Pilkington, 2 B. & S. 11; Godard v. Gray, L. R. 6 Q. B. 139; Castrique v. Imrie, L. R. 4 H. L. 445.

[38] A State statute permitting such a defense has been held unconstitutional and void. Sweet v. Brackley, 53 Me. 346; Christmas v. Russell, 5 Wall. (72 U. S.) 290; bk. 18 L. ed. 475.

[39] Gunn v. Howell, 35 Ala. 144; s. c., 62 Am. Dec. 785; Indiana v. Helmer, 21 Iowa, 370; Barringer v. Boyd, 27 Miss. 473; Grover v. Grover, 30 Mo. 400; Merchants' Ins. Co. v. De Wolf, 33 Pa. St. 45; Scott v. Pilkington, 2 Best & S. 11.

8. *Impeaching Record of Foreign Judgment.*—Whether a defendant who is sued upon a foreign judgment may dispose a recital in the record of personal service upon him, or an appearance by an attorney, thereby denying the jurisdiction of the court rendering the judgment, the cases are divided; some hold that he can,[40] but the better opinion seems to be that the averment in record of personal service or appearance is conclusive in other States.[41] And where the record contains no averment of service or appearance, it is always open to the defendant to show want of jurisdiction over his person.[42]

9. *Denying Authority of Attorney to Appear.*—Where the record shows appearance by attorney only, the defendant, although he may not deny the fact of such appearance,[43] he may deny that such attorney had any authority to appear.[44]

10. *Foreign Judgments Simply Evidence of Debt.*—The judgments of courts of record in one State are entitled to recognition by the courts of sister States as evidence of a debt simply,[45] they have no extraterritorial force as judgments.[46] But as the original debt is not merged in a judgment rendered in a foreign court, such judgment may be as evidence by either party, in a suit on the original cause of action, without a formal allegation in the proceedings, and if it settles the

[40] See Starbuck v. Murray, 5 Wend. (N. Y.) 148; s. c., 21 Am. Dec. 172; Carleton v. Bickford, 13 Gray (Mass.), 591; s. c., 74 Am. Dec. 652; Rape v. Heaton, 9 Wis. 329; s. c., 76 Am. Dec. 269; Norwood v. Cobb, 24 Tex. 551.

[41] See Welch v. Sykes, 3 Gilm. (Ill.) 197; s. c., 44 Am. Dec. 689; Lawrence v. Jarvis, 32 Ill. 304; Baltzell v. Nosler, 1 Clarke (Iowa), 588: Walker v. Lathrop, 6 Clarke (Iowa), 516; Westcott v. Brown, 13 Ind. 83; Wilcox v. Kassick, 2 Mich. 165; Wilson v. Jackson, 10 Mo. 330; Pritchett v. Clark, 3 Harr. (Del.) 241; Lincoln v. Tower, 2 McL. C. C. 473; Thompson v. Emmert, 4 McL. C. C. 96; Hampton v. McConnel, 3 Wheat. (U. S.) 234.

[42] Gunn v. Howell, 27 Ala. 663; s. c. 62 Am. Dec. 785; Nunn v. Sturges, 22 Ark. 389; Dunbar v. Hollowell, 34 Ill. 168; Pollard v. Baldwin, 22 Iowa, 328; Bissell v. Wheelock, 11 Cush. (Mass.) 277; Reid v. Boyd, 13 Tex. 241; s. c., 65 Am. Dec. 61; D'Arcy v. Ketchum, 11 How. (U. S.) 165.

[43] Roberts v. Caldwell, 5 Dana (Ky.), 512; Gilbert v. Lane, 3 Porter, 267.

[44] Aldrich v. Kinney, 4 Conn. 380; s. c., 10 Am. Dec. 151; Lawrence v. Jarvis, 32 Ill. 304; Harshey v. Blackmarr, 20 Iowa, 161; Kerr v. Kerr, 41 N. Y. 272; Watson v. New England Bank, 4 Metc. (Mass.) 343; Shelton v. Tiffin, 6 How. (U. S.) 163.

[45] Elizabethtown Savings Institution v. Gerber, 34 N. J. Eq. 130.

[46] *Id.*

whole controversy between the parties, it is conclusive.[47]

11. *Priviliges and Priorities of Foreign Judgments.*—Foreign judgments carry with them none of the priviliges or priorities that belong to them in the courts of the State where they are rendered, but only those which the *lex fori* gives to them as foreign judgments.[48]

The constitution does not confer any new power upon the States, but simply regulates the effect of their acknowledged jurisdiction over persons and things within their own territory;[49] it does not make the judgments of the courts of sister States domestic judgments to all intents and purposes,[50] but simply gives a general validity, faith and credit to them as evidence, and no execution can issue upon them until after a new suit and judgment in the courts of the other States.[51]

12. *Tendency of Decisions to Restrict Foreign Judgments.* — The tendency of recent decisions is to restrict the force of foreign judgments when they are relied upon as a cause of action in another State.[52] The doctrine of the American courts in relation to foreign judgments seems now to be that they are only *prima facie* evidence of the facts therein recited regarding the jurisdiction of the court,[53] but are conclusive upon the merits, and can only be impeached for want of jurisdiction or fraud.[54]

Such judgments are to be deemed right until the contrary is established.[55] If they are founded on frauds or pronounced by a court that has not acquired jurisdiction of the cause, they may be avoided.[56]

13. *Conclusiveness of Foreign Judgments.*—The question whether foreign judgments are to be deemed conclusive, or whether the defendant is at liberty to go at large into the original merits to show that the judgment ought to have been different upon the merits, although obtained *bona fide*, has been much discussed in England.[57]

[47] New York, L. E. & W. Ry. Co. v. McHenry, 17 Fed. Rep. 414.

[48] Wood v. Watkinson, 17 Conn. 500; s. c., 44 Am. Dec. 562; McElmoyle v. Cohen, 13 Pet. (U. S.) 312-328-329; Story, Conf. L. §§ 582-609. Where a discharge in bankruptcy is a good defense to a judgment record subsequent to such discharge, but founded on a claim existing prior to the commencement of such bankruptcy proceedings, such discharge will be a good defense to an action on such judgment in another State, although the rule in the latter State regarding such judgments might be different. Haggerty v. Amory, 7 Allen (Mass.), 458. But such discharge will not be a defense where the rule in both States is that such discharge is no bar. Bradford v. Rice, 102 Mass. 472.

[49] Shumway v. Stillman, 6 Wend. (N. Y.) 447; Harrod v. Barretto, 1 Hall (N. Y.), 55; s. c., 2 Hall (N. Y.), 302; Wilson v. Miles, 2 Hall (N. Y.), 358; Hall v. Williams, 6 Pick. (Mass.) 237; s. c., 17 Am. Dec. 356; Bissell v. Briggs, 9 Mass. 462; s. c., 6 Am. Dec. 88; Evans v. Tatem, 9 Serg. & R. (Pa.) 260; s. c., 11 Am. Dec. 717; Benton v. Burgot, 10 Serg. & R. (Pa.) 240; Hoxie v. Wright, 2 Vt. 263; Bellows v. Ingham, 2 Vt. 575; Aldrich v. Kinney, 4 Conn. 380; s. c., 10 Am. Dec. 151.

[50] See D'Arcy v. Ketchum, 11 How. (U. S.) 165.

[51] See Dimick v. Brooks, 21 Vt. 561.

[52] See Arndt v. Arndt, 15 Ohio, 33; McVicker v. Beedy, 31 Me. 316; s. c., 50 Am. Dec. 666; Price v. Hickok, 39 Vt. 292; Moulin v. Insurance Co., 4 Zab. (N. J.) 222; Gillett v. Camp, 23 Mo. 375; Trimble v. Longworth, 13 Ohio St. 439; Smith v. Smith, 17 Ill. 482; Pollard v. Wegener, 13 Wis. 569; Jones v. Spencer, 15 Wis. 583; Ewer v. Coffin, 1 Cush. (Mass.) 23; s. c., 48 Am. Dec. 587; Foster v. Glazener, 27 Ala. 396.

[53] See Carleton v. Bickford, 13 Gray (Mass.), 591; s. c., 74 Am. Dec. 652; Bodurtha v. Goodrich, 3 Gray (Mass.), 108; Silver Lake Bank v. Harding, 5 Ohio, 545; Indiana v. Helmer, 21 Iowa, 370; Lewis v. Wilder, 4 La. Ann. 574; Bissell v. Briggs, 9 Mass. 462; s. c., 6 Am. Dec. 88; Borden v. Fitch, 15 Johns. (N. Y.) 121; s. c., 8 Am. Dec. 225; Green v. Sormelnto, 1 Pet. C. C. 74; Field v. Gibbs, 1 Pet. C. C. 155; Aldrich v. Kinney, 4 Conn. 380; s. c., 10 Am. Dec. 151; Shumway v. Stillman, 6 Wend. (N. Y.) 447; Hall v. Williams, 6 Pick. (Mass.) 247; s. c., 17 Am. Dec. 356; Starbuck v. Murray, 5 Wend. (N. Y.) 148; s. c., 21 Am Dec. 172; Davis v. Peckard, 6 Wend. (N. Y.) 327; Buttrick v. Allen, 8 Mass. 273; s. c., 5 Am. Dec. 105; Pawling v. Bird's Exrs., 13 Johns. (N. Y.) 192; Rathbone v. Terry, 1 R. I. 73; Hitchcock v. Aicken, 1 Caine (N. Y.), 460; Hoxie v. Wright, 2 Vt. 263; Bellows v. Ingham, 2 Vt. 575; Barnes v. Patterson, 6 Harr. & J. (Md.) 182; Andrews v. Herriot, 4 Cow. (N. Y.), 520 n.; 2 Kent Com. 118. But this rule does not seem to have been adopted by the Supreme Court of the United States. See Landes v. Brant, 10 How. (U. S.) 348.

[54] See Cummings v. Banks, 2 Barb. (N. Y.) 602; Noyes v. Butler, 6 Barb. (N. Y.) 613; Lazier v. Westcott, 26 N. Y. 152; Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 126. Compare Rankin v. Goddard, 54 Me. 28; Wood v. Watkinson, 17 Conn. 500; s. c., 44 Am. Dec. 562; Welch v. Sykes, 3 Gilm. (Ill.) 197; s. c., 44 Am. Dec. 689.

[55] Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 126; Ripple v. Ripple, 1 Rawle (Pa.), 386; Hall v. Odber, 11 East, 118; Alivon v. Furnival, 1 Cromp. M. & R. 277; Price v. Dewhurst, 8 Sim. 279; Houlditch v. Donegal, 2 Clark & Finn. 470; Arnott v. Redfern, 3 Bing. 353; Sinclair v. Fraser, Doug. 4-5 n.; Walker v. Witter, Doug. 1.

[56] See Don v. Lippmann, 5 Clark & Finn. 1-19-20-21; Ferguson v. Mahon, 11 Ad. & E. 179-182; Price v. Dewhurst, 8 Sim. 279-302; Ferguson v. Mahon, 3 Per. Dav. 143; Bowles v. Orr, 1 Younge & C. 464; Story Conf. L., §§ 544-545-550-602.

[57] See Kennedy v. Earl of Cassilils, 2 Swanst. 326-327, n.; Boucher v. Lawson, Cas. T. Hard, 89; Roach v. Garvan, 1 Ves. 157; Walker v. Witter, Doug. 1-6, n. 3; Herbert v. Cook, Willes, 36, n.; Hall v. Odber, 11 Ea

But the doctrine may be said to be now well established that a foreign judgment is only *prima facie* evidence upon the question whether the foreign court had jurisdiction of the subject-matter or the person of the defendant, or whether the judgment was regularly obtained; but that it is so far conclusive upon the defendant or to prevent him from denying that the promises upon which it was founded were ever made. or alleging that they were obtained by fraud of the plaintiff. It is also said that the pleas which might have been filed to the original action cannot be pleaded to an action upon the judgment.[58]

14. *Pending of Suit in Another State.*—It seems that the pendency of a suit in a foreign court cannot be set up as a defense in a subsequent suit.[59] And each State in the Union, being foreign to every other except as united for national purposes under the constitution,[60] in this respect they are foreign countries, so that the mere pendency of a suit in the courts of another State cannot be pleaded in abatement.[61]

It is said that the rule that the judgment is to be *prima facie* evidence would be a mere delusion if the defendant were permitted to question it by opening all or any of the original merits on his side which under such circumstances would be equivalent to granting a new trial; that the defendant may impeach the original judgment by showing that the court had no jurisdiction; that he never had notice of suit, that the judgment was procured by fraud, that upon its face it is founded upon mistake, or that it is irregular and bad by the local law, but that beyond this he cannot impugn the judgment.[62]

But it seems that where a debtor has been sued by his creditor in one State, such suit will be a bar in a suit in another State by a person having a claim against such creditor, seeking to hold the debtor as a trustee.[63] The same rule applies to actions in the federal and State courts.[64]

The same rule applies to a suit pending in a United States court for a different district than the one in which the State in which the second action is instituted is situated,[65] and *vice versa*.[66] Otherwise, however, where the first action is pending in the United States circuit court in which the State in which the second action is brought is situated, provided the circuit court has jurisdiction of the cause.[67]

But where one of the actions is at law and the other is in equity neither will be cause for abatement.[68]

118; Bayley v. Edwards, 3 Swanst. 703-711-712; Philips v. Hunter, 2 H. Black. 410; Galbraith v. Neville, Doug. 6, n. 3; Sinclair v. Fraser, Doug. 4-5, n. 1; Alivon v. Furnival, 1 Cromp. M. & R. 277; Guinness v. Carroll, 1 Barn. & Ad. 459; Becquet v. McCarthy, 2 Barn. & Ad. 951; Tarleton v. Tarleton, 4 Maule & S. 21; Martin v. Nicolls, 3 Sim. 458; Bank of Australasia v. Harding, 19 Law Jour. C. P. 345; s. c., 9 C. B. 661; Houlditch v. Donegal, 8 Bligh, 301-340; Henderson v. Henderson. 3 Hare, 100-113-115.

[58] See Bank of Australasia v. Nias, 16 Q. B. 717; s. c., 4 Eng. L. & Eq. 252; Hendrson v. Henderson, 6 Q. B. 288; Reimers v. Druce, 23 Beav. 149; De Cosse Brissac v. Rathbone, 6 H. & N. 301; Vanquelin v. Bouard, 15 C. B. (N. S.) 341; Ricardo v. Garcias, 12 Clark & Finn. 368; Scott v. Pilkington, 2 Q. & S. 11; Crawley v. Isaacs, 16 L. T. (N. S.) 529; Vallee v. Dumergue, 4 Exch. 290; Cowan v. Braidwood, 2 Scott, N. R. 138; Doglioni v. Crispin, L. R. 1 H. L. 301.

[59] Scott v. Seymour, 1 Hurls. & C. 219; Cox v. Mitchell, 7 C. B. (N. S.) 55; Ostell v. Lepage, 5 De Gex & S. 95; s. c., 10 Eng. L. & Eq. 255; Bayley v. Edwards, 3 Swanst. 703; Maule v. Murray, 7 T. R. 470; Russell v. Field, Stewart's Canada, 558.

[60] Buckner v. Finley & Van Lear. 2 Pet. 586.

[61] Bowne v. Joy, 9 Johns. (N. Y.) 221; Salmon v. Wooton, 9 Dana (Ky.), 423; McJulton v. Love, 13 Ill. 486; s. c., 54 Am. Dec. 449; Drake v. Brander, 8 Tex. 352; Seevers v. Clement, 28 Md. 434; Smith v. Lathrop, 44 Pa. St. 326; Hatch v. Spofford, 22 Conn. 485; s. c., 58 Am. Dec. 433; Goodall v. Marshall, 11 N. H. 99; s. c., 35 Am. Dec. 472; Cook v. Litchfield, 5 Sanf. (N. Y.) 542.

[62] See Ferguson v. Mahon, 11 Ad. & El. 179-182; Arnott v. Redfern, 2 Carr. & P. 88; s. c., 3 Bing. 353; Novelli v. Rossi, 2 Barn. & Ad. 757; Douglas v. Forrest, 4 Bing. 686; Obicini v. Bligh, 8 Bing. 335; Martin v. Nicolls, 3 Sim. 458; Alivon v. Furnival, 1 Cromp. M. & R. 277; Starkie, Ev. pt. 2, § 67; Huberus, Tom. 2 Lib. 1, tit. 3, de Conflictu, § 6.

[63] Merrill v. New England Ins. Co., 103 Mass. 249; Whipple v. Robbins, 97 Mass. 107; American Bank v. Rollins, 99 Mass. 313.

[64] Freeman v. Howe, 24 How. (65 U. S.) 450; bk. 16 L. ed. 749.

[65] Walsh v. Durkin, 12 Johns. (N. Y.) 99; Cook v. Litchfield, 5 Sandf. (N. Y.) 330.

[66] White v. Whitman, 1 Curt. C. C. 494; Lyman v. Brown, 2 Curt. C. C. 559.

[67] Smith v. Atlantic Mut. Fire Ins. Co., 2 Foster (N. H.), 21.

[68] Hatch v. Spofford, 22 Conn. 485; s. c., 58 Am. Dec. 433; Colt v. Partridge, 7 Met. (Mass.) 370. And the same is true where both actions are at law if the parties be reversed. Wadleigh v. Veazie, 3 Summer C. C. 165.

MUNICIPAL CORPORATION — STREET IMPROVEMENTS — NEGLIGENCE OF CONTRACTOR — RESPONDEAT SUPERIOR — CONTRIBUTORY NEGLIGENCE — WHAT IS NOTICE.

CITY OF BIRMINGHAM v. McCRARY.

Supreme Court of Alabama, July 10, 1888.

1. *Municipal Corporation—Street Improvements—Negligence of Contractor—Respondeat Superior.*—When a municipal corporation lets a contract to improve its streets, and the contract directly requires the performance of a work intrinsically dangerous, or when the corporation is bound to keep its streets free from defect, it is liable to a party injured by negligence of the contractor, though it did nothing except to locate and accept the work; in such case the principle of *respondeat superior* applies.

2. *Same—Contributory Negligence—A Question for the Jury.*—In an action against a city for damages caused from the alleged negligence of the corporate authorities in allowing a ditch made across a sidewalk, incident to the construction of a sewer, to be open during the night-time without lights or other suitable protection, in consequence of which the plaintiff fell in and broke his arm: *Held*, that whether there was contributory negligence or not on the part of the injured party, was not a question of law, but one of fact, to be passed on by the jury.

3. *Same—What is Notice.*—In cases of this nature, special notice to the city of the dangerous condition of the street where the improvement is being made, is not necessary to hold the municipal corporation liable for injuries. The city is charged with notice when the work is being done by its expressed authority, in a measure, under the eye of its engineer, and necessarily dangerous in its nature.

SOMERVILLE, J., delivered the opinion of the court:

The present action is based upon the alleged negligence of the corporate authorities of the city of Birmingham in allowing a ditch or excavation made across a sidewalk, incident to the construction of a sewer, to remain open during the night-time, without covering, guards, or lights, in consequence of which the plaintiff fell in, and was injured by the breaking of his arm. The main defense relied on by the city is that the wrong act complained of was the act of one Stonestreet, to whom the city had lawfully let the contract of constructing the sewers, and that, under the terms of the contract, Stonestreet was an independent contractor, and, as such, was alone liable to the plaintiff for the damages claimed, if any one was so liable. Contributory negligence on the part of the plaintiff, and want of notice of the defect or excavation in the street, were also relied on by the defendant. The contract between the city and Stonestreet provided that the work was to be done according to certain plans and specifications, and under the supervision of the city engineer, so far as to make it his duty to inspect the laying of the sewer-pipes, and to accept and receive the work when completed; but neither the engineer, nor other city officers, had anything to do with the employment or direction of the hands, or of superintending the work while it was in progress, except that it was the engineer's duty to lay out the work, set the stakes fixing the depth the sewer-pipes were to be laid, and to see that they were laid at proper depth or grade.

The general rule is well settled, and not denied by appellee's counsel, that one person is not ordinarily liable for any injury produced by the negligence of another, unless the relation of master and servant exists between them; and that where such injury is done by an independent contractor, or one who reserves the general control over the work, with the right to direct what shall be done, and the manner of doing it, the *quasi* employer or contractee cannot be held liable for an injury resulting from the negligence of such contractor, or of his servants, and collaterally to the work contracted to be done, such work not being a nuisance *per se*. In all such cases the rule *respondeat superior* applies. Wood. Mast. & Serv. (2d Ed.) p. 603, § 314 *et seq.*; *Id.* p. 598, § 313; Cuff v. Railroad Co., 35 N. J. Law, 17, 10 Amer. Rep. 205. But there are two established classes of exceptions to which this general rule had no application. It does not apply (1) where the work contracted to be performed will, in its progress, however skilfully done, be necessarily or intrinsically dangerous; and (2) where the law imposes on the employer the duty to keep the subject of the work in a safe condition.

The first exception applies where the obstruction or defect which produced the injury results directly and necessarily from the acts which the contractor agreed and was authorized to do; the person authorizing and the person authorized each being equally liable to the injured party, the relation of principal and agent, *pro hac vice* at least, existing between them, notwithstanding the employment may in other respects be independent. "It would be monstrous," said Lord Campbell, in Ellis v. Gas Co., 2 El. & Bl. 767, "if the party causing another to do a thing were exempted from liability for that act merely because there was a contract between him and the person immediately causing the act to be done." The rule is said by Mr. Justice Clifford, in Water Co. v. Ware, 16 Wall. 566, to be based on common justice, that, "if the contractor does the thing which he is employed to do, the employer is as responsible for the thing as if he had done it himself; but if the act which is the subject of complaint is purely collateral to the matter contracted to be done, and arises indirectly in the course of the performance of the work, the employer is not liable, because he never authorized the work [act] to be done." It is observed by Mr. Dillon, in his work on Municipal Corporations, that while the principal of *respondeat superior* does not generally extend to cases of independent contracts, where the party for whom the contract is to be done is not the immediate superior of those guilty of the wrongful act, and has no choice in the selection of the workmen, and no control over the manner

of doing the work, it is important to bear in mind that this general rule "does not apply where the contract directly requires the performace of a work intrinsically dangerous, however skillfully performed." "In such a case," he adds, "the party authorizing the work is justly regarded as the author of the mischief resulting from it, whether he does the work himself, or lets it out by contract." 2 Dill. Mun. Corp. (3d Ed.) § 1029. A fair illustration of this principle is found in the case of City of Joliet v. Harwood, 86 Ill. 110, 29 Amer. Rep. 17, where a city employing a contractor to construct a sewer, where the work necessarily involved the blasting of rock, was held liable for the damage resulting from a rock thrown by the blast against the plaintiff's house. The right of recovery was held not to rest on the charge of negligence by the contractor, who used all proper diligence in his work, but upon the fact that "the city caused work to be done which was intrinsically dangerous, the natural, though not the necessary, consequence of which was the injury to plaintiff's property." So, in the case of McCafferty v. Railroad Co., 61 N. Y. 178, we have an example of the principle that there is no liability where the injury is collateral to the work done by an independent contractor, and not a necessary result of its execution. There a railroad company lawfully let the work of constructing its road to a contractor, who sublet a part of the work to others. The employees of a subcontractor, by negligently overcharging a blast of powder, caused rocks to be thrown against the plaintiff's premises, resulting in the damage complained of in the action. The railroad company was held not to be responsible. In cases of this kind it has been held that the injury is presumed to be a necessary incident of doing the work, unless the defendant shows that it resulted from some act of negligence on the part of the contractor or his servants. Sabin v. Railroad Co., 25 Vt. 363. Mr. Wood, in his work on Master and Servant, thus formulates the principle: "When the work cannot be done at all, in the ordinary modes of executing it, without producing injury and damage, the contractor is liable; but when the injury and damage result simply from the careless or improper mode of executing the work, and the contractee has been guilty of no negligence in selecting a contractor, there is no principle of law which casts upon the contractee the burden of responsibility;" "and," he adds, "a contrary doctrine would be disastrous in its consequences, and serve seriously to embarrass and retard the proper use and healthy development of property, and the growth of cities and towns." Wood, Mast. & Serv. p. 609 *et seq.*; *Id.* p. 603, § 314. Such is the rule governing the first class of excepted cases above enumerated, where the work contracted to be performed is intrinsically dangerous, or arises from the very nature of the improvement, which is said by Mr. Dillion to be applicable to work done by independent contractors, according to the later and better considered cases in this country. This doctrine he states to be that, "where the work contracted for necessarily constitutes an obstruction or defect in the street, of such a nature as to render it unsafe or dangerous for the purpose of public travel unless properly guarded or protected, the employer (equally with the contractor), where the injury results directly from the acts which the contractor engaged to perform, is liable therefor to the injured party. But the employer is not liable where the obstruction or defect in the street, causing the injury, is wholly collateral to the contract work, and entirely the result of the negligence or wrongful acts of the contractor, subcontractor, or his servants. In such a case, the immediate author of the injury is alone liable." 2 Dill. Mun. Corp. (3d Ed.) § 1030. The rule, as thus carefully formulated by Judge Dillon, is fully supported by the adjudged cases, at least in the American courts; and seems to us to be correct one. Wilson v. City of Wheeling, 19 W. Va. 323, 42 Amer. Rep. 780; City of Erie v. Caulkins, 27 Amer. Rep. 647, note; Storrs v. City of Utica, 17 N. Y. 104, 72 Amer. Dec. 437, and note, 441; Sulzbacher v. Dickie, 51 How. Pr. 500.

The second class of excepted cases, or those where the law imposes on the employer the duty to keep the subject of the work in safe condition, especially include those municipal corporations upon which the duty is imposed, directly or impliedly, by statute, to keep their streets in a safe condition for the traveling public. It is not denied that the charter of the city of Birmingham devolves upon it this obligation, impliedly at least, as a necessary result from the corporate powers given and the corporate duties imposed. Acts 1880-81, pp. 471, 480, § 20; Albrittin v. Mayor, etc., 60 Ala. 486, 31 Amer. Rep. 46; City Council v. Wright, 72 Ala. 411. This fact brings the case within the rule under consideration, which is quite distinct from the last rule above discussed by us. It depends on the principle that, where the statute thus imposes a duty upon a corporation, its faithful discharge cannot be evaded by any effort to cast this duty on another by contract or otherwise. This the law will not permit, nor can liability for damages resulting from the neglect of such duty be avoided in any such way. "Therefore, according to the better view," says Mr. Dillion, "where a dangerous excavation is made, and negligently left open (without proper lights, guards, or coverings), in a traveled street or sidewalk, by a contractor under the corporation for building a sewer or other improvements, the corporation is liable to a person injured thereby, although it may have had no immediate control over the workmen, and had even stipulated in the contract that proper precautions should be taken by the contractor for the protection of the public, and making him liable for accidents occasioned by his neglect." 2 Dill. Mun. Corp. (3d ed.) § 1027. There is a general *consensus* of authority in support of this view; the case on the subject being that of Storrs v. City of

Utica, *supra*, decided by the New York court of appeals in 1858. That case, like this, was based on the negligence of the city in allowing an excavation in the street, made in the construction of a sewer, to remain open and unguarded during the night-time, in consequence of which the plaintiff fell in and was hurt. The city was held liable apparently on each of the grounds above discussed. "The cause of the accident," said Judge Comstock, "was not in the manner in which the work was carried on by the laborers. If it had been, their immediate employer, and he only, was liable for the injury." "But," he continues, "in a sense strictly logical, as it seems to me, the accident was the result of the work itself, however skilfully performed. A ditch cannot be dug in a public street, and left open and unguarded at night, without imminent danger of such casualties. If they do occur, who is the author of the mischief? Is it not he who causes the ditch to be dug, whether he does it with his own hands, employes laborers, or lets it out by contract? If by contract, then I admit that the contractor must respond to third parties if his servants or laborers are negligent in the immediate execution of the work. But the ultimate superior or proprietor first determines that the excavation shall be made, and then he selects his own contractor. Can he escape responsibility for putting a public street in a condition dangerous for travel at night, by interposing the contract which he himself has made for the very thing which creates the danger? I should answer this question in the negative." In the same case, this principle is applied to a municipal corporation which owes to the public the duty of keeping the street in a safe condition for travel; and the proposition is asserted that this duty cannot be thrown off or devolved on another who contracts for the construction of sewers or other improvements in the public streets. "Although," it is said, "the work may be let out by contract, the corporation still remains charged with the care and control of the street in which the improvement is carried on. The performance of the work necessarily renders the street unsafe for night travel. This is a result which does not at all depend on the care or negligence of the laborer employed by the contractor. The danger arises from the very nature of the improvement; and if it can be averted only by special precautions, such as placing guards or lighting the street, the corporation which has authorized the work is plainly bound to take these precautions. The contractor may very probably be bound by agreement, not only to construct the sewer, but also to do such other acts as may be necessary to protect travel. But a municipal corporation," he concludes, "cannot, I think, in this way, either avoid indictment in behalf of the public, or its liability to individuals who are injured." Storrs v. City of Utica, 72 Amer. Dec. 437, 440. We make no apology for quoting so much at length from this case, where the subject under consideration is so ably and learnedly discussed. That case is strictly analogous to the one in hand, and has been followed by the United States Supreme Court, as well as by nearly all of the State courts, except in Pennsylvania, and a single case in Missouri, which seems, however, to have been impliedly overruled by a later decision in the same State. Blake v. St. Louis, 40 Mo. 569; Barry v. St Louis, 17 Mo. 121; Painter v. Mayor, 46 Pa. St. 213. The decisions of these States, relied on in the argument of this cause by the appellant's counsel, have been generally condemned in this country, and we are unwilling to follow them. Storrs v. City of Utica, 72 Amer. Dec. 437, note, 441, and cases cited; City of Erie v. Caulkins, 85 Pa. St. 247, 27 Amer. Rep. 642, and note, 647-650; Robbins v. Chicago, 4 Wall. 657; Chicago v. Robbins, 2 Black, 418; Water Co. v. Ware, 16 Wall. 566; City of Springfield v. Le Claire, 49 Ill. 476; City of Detroit v. Corey, 9 Mich. 165; Circleville v. Neuding, 41 Ohio St. 465; City of St. Paul v. Seitz, 3 Minn. 297 (Gil. 205); Nashville v. Brown, 9 Heisk. 1, 24 Amer. Rep. 289; Wilson v. City of Wheeling, 19 W. Va. 323, 42 Amer. Rep. 780; Mayor, etc., v. O'Donnell, 53 Md. 110, 36 Amer. Rep. 395; City of Logansport v. Dick, 70 Ind. 65, 36 Amer. Rep. 166; City of Buffalo v. Holloway, 57 Amer. Dec. 550; 2 Dill. Mun. Corp. (3d Ed.) §§ 1027, 1029, 1030; Wood, Mast. & Serv. (2d Ed.) p. 616, § 316.

The city court substantially conformed its rulings to the foregoing principles. The excavation made across the sidewalk of the city, in the process of constructing the sewer, was made by the express authority of the city in the exercise of a purely ministerial power. Stonestreet, notwithstanding the general independent nature of his employment as a contractor, was a *quasi* agent of the municipal authorities for this purpose. If he had been indicted for creating a nuisance, he could only have defended under the right conferred by them, and as their agent *pro hac vice*. City of Detroit v. Corey, 9 Mich. 164; Nashville v. Brown, 24 Amer. Rep. 289. The excavation was one which in its nature would be intrinsically or necessarily accompanied with danger to pedestrians if left uncovered or unguarded, and without proper lights, in the night-time. The duty of the city, imposed by its charter, was to see to it that its sidewalks were kept in a reasonably safe condition for ordinary use by the public. This duty it could not escape by letting out the work to a contractor. The authorities should have seen to it that the contractor performed his duty; and for this act of negligence they are liable for any injury and damages proximately resulting from it, to which the plaintiff did not contribute by his want of ordinary care. The court, in effect, so charged. In cases of this nature, it is manifest that special notice to the city of the dangerous condition of the street where the excavation is made, is not a prerequisite to liability. The work being done by the express authority of the city, and, in a measure, under the eye of its engineer, and necessarily dangerous in its nature, the

municipal authorities are charged with notice of its existence. Brusso v. City of Buffalo, 90 N. Y. 679; City of Springfield v. Le Claire, 49 Ill. 477. There is a class of cases where the liability of the city is made to depend on its negligence to keep its streets in repair, and the question of negligence is dependent on notice to the city of the existence of some defect or obstruction causing the injury. But where an agent or *quasi* agent of the city creates the defect by an authorized act, as here, the law imputes notice to the employer. 2 Dill. Mun. Corp. (3d ed.) § 1025, note 1. In this case different conclusions may well and reasonably have been drawn, from the evidence, on the question of contributory negligence *vel non* on the part of the plaintiff; and for this reason the court properly submitted this inquiry to the jury, and declined to determine it as a matter of law. City Council v. Wright, 72 Ala. 411; Eureka Co. v. Bass, 81 Ala. 200, 60 Amer. Rep. 152.

We find no error in any of the rulings of the court, and the judgment is affirmed.

NOTE.—*General Rule—Respondeat Superior.*—It is well settled that one person is not liable for the negligence of another, except the relation of master and servant exists between them. When an injury is done by an independent contractor, or his servants, with the right to direct what shall be done, and the manner of doing it, he is liable for the damages resulting from his negligence, and collaterally to the work contracted to be done, such work not being a nuisance *per se*. *Respondeat superior* applies in such cases. But the principle of *respondeat superior* does not apply where the party for whom the work is to be done is not the immediate superior, and has no choice in the selection of the servants, and no control over the manner of doing the work.[1]

Exceptions to the General Rule.—1. The general rule does not apply where the contract directly requires the performance of a work intrinsically and necessarily dangerous, although the contractor uses the most skilful method in its prosecution. Under this condition the city or party authorizing the work is considered the author of the injury resulting from it, whether he does the work himself, or lets it out by contract. The person authorizing and the person authorized, are both equally liable to the injured party, the relation of principal and agent, *pro hac vice* at least, existing between them.[2]

In the case of Joliet v. Harwood,[3] it is held that the principle of *respondeat superior* does not extend to cases of independent contracts, where the party for whom the work is being done is not the immediate superior to those causing the injury, and has no control over the manner of doing the work; that the rule is otherwise where the work is dangerous in itself, no matter how skilfully done. Thus, if a city employs a contractor to blast a rock in a street for a sewer, and he uses all due care, and damages result to another from a stone thrown by the blasting, the city will be liable in damages for the injury.[4]

But the city is not liable where the defect in the street, causing the injury, is wholly collateral to the work and entirely the result of the negligence or wrongful act of the contractor or his servants.[5]

In the case of McCafferty v. Railroad Co.,[6] a railroad company let by contract the entire work of building its track. The contractor sublet a portion of the work; the servants of the subcontractor, in performing the work, by a blast threw stones and rocks upon the plaintiff's premises, injuring it: *Held*, the railroad company was not liable. It was also held that Hay v. Cohoes County[7] was not applicable to the question involved in this case.

2. Where the duty is imposed upon a city to keep its streets in a safe condition for use of the public, it cannot shift this obligation to a person who had been employed to improve the streets, and if an injury results from neglect of such duty, the corporation may be held liable for the injury. Where the charter or statute imposes a duty upon a city, its faithful discharge cannot be evaded by any effort to cast this duty on another by contract or otherwise.[8]

[1] Erie v. Caulkins, 85 Pa. St. 247; s. c., 27 Am. Rep. 642; Harrison v. Collins, 86 Pa. St. 153; Painter v. Mayor, 46 Pa. St. 213; Cuff v. Newark, 35 N. J. L. 17; s. c., 10 Am. Rep. 205; Scammon v. Chicago, 25 Ill. 424; Blake v. Ferris, 1 Seld. (N. Y.) 48; King v. Railroad Co., 66 N. Y. 181; Storrs v. Utica, 17 N. Y. 104; Cincinnati v. Stone, 5 Ohio St. 38; Hilliard v. Richardson, 3 Gray (Mass.), 349; Harper v. Milwaukee, 30 Wis. 365; Wood Mast. & Serv. (2d ed.) p. 603, § 314, *et seq.*; Water Co. v. Ware, 16 Wall, 566; Croft v. Alison, 4 B. & Ald. 590; Wright v. Wilcox, 19 Wend. 343; Johnson v. Friel, 50 N. Y. 679; McCafferty v. Railroad Co., 61 N. Y. 178; Butler v. Hunter, 7 Hurl. & N. 826; Allen v. Willard, 57 Pa. St. 374; McGuire v. Grant, 1 Dutch. (N. J. L.) 356; Steele v. Railroad Co., 16 C. B. 550; Rapson v. Cubit, 9 M. & W. 710; Holmes v. Railroad Co., L. R., 4 Exch. 254; Gillis v. Railroad Co., 8 Am. Law Reg. (N. S.) 729; Smith v. Dock Co., L. R., 3 C. P. 326; Knight v. Fox, 5 Exch. 721; Overton v. Freeman, 11 C. B. 867; Plymouth Coal Co. v. Kommisky, 116 Pa. St. 365; Haxamer v. Webb, 101 N. Y. 377; s. c., 57 Am. Rep. 703; Edmundson v. Railroad Co., 111 Pa. St. 316; Rankin v. Transportation Co., 73 Ga. 229; Hitte v. Railroad Co., 19 Neb. 620; Bennett v. Truebody, 66 Cal. 509; Matthes v. Kerrigan, 53 N. Y. Super. Ct. 431.

[2] Tiffin v. McCormick, 34 Ohio St. 638; Stone v. Railroad Co., 19 N. H. 427; Lowell v. Railroad Co., 23 Pick. 24; Carman v. Railroad Co., 4 Ohio St. 339; Fay v. Davidson, 13 Minn. 523; Savannah v. Waldner, 49 Ga. 316; Blake v. St. Louis, 40 Mo. 569; Murphy v. Lowell, 124 Mass. 564; Wright v. Halbrook, 52 N. H. 120; Harrisburg v. Saylor, 87 Pa. St. 216; Joliet v. Harwood, 86 Ill. 110; Whitney v. Clifford, 46 Wis. 138; Turner v. Newburg (N. Y.), 16 N. E. Rep. 344; Klein v. Dallas (Tex.), 8 S. W. Rep. 90; Chapman v. Milton (W. Va.), 7 S. E. Rep. 22.

[3] 86 Ill. 110.

[4] Shearman & Redfield on Neg., § 142; Pfau v. Williamson, 63 Ill. 16; Kelly v. Mayor, 11 N. Y. 432; St. Paul v. Letz, 3 Minn. 297.

[5] Wilson v. Wheeling, 19 W. Va. 323; Robbins v. Chicago, 4 Wall. 657; Sulzbacher v. Dickie, 51 How. Pr. 500; Nashville v. Brown, 9 Heisk. (Tenn.) 1; Erie v. Caulkins, 85 Pa. St. 247; s. c., 27 Am. Rep. 647, and note; Storrs v. Utica, 17 N. Y. 104; s. c., 72 Am. Rep. 437, and note; Kelly v. Mayor, 11 N. Y. 432; Cincinnati v. Stone, 5 Ohio St. 38; Goudier v. Cormack, 2 E. D. Smith (N. Y.), 254; Detroit v. Corey, 9 Mich. 165; Springfield v. Le Claire, 49 Ill. 476; Palmer v. Lincoln, 5 Neb. 136.

[6] 61 N. Y. 178.

[7] 2 N. Y. 159.

[8] Circleville v. Neuding, 41 Ohio St. 465; Storrs v. Utica, 17 N. Y. 104; Mayor v. O'Donnell, 53 Md. 110; Buffalo v. Halloway, 3 Seld. (N. Y.) 493; Robbins v. Chicago, 2 Black. (U. S.) 418; City Council v. Wright, 72 Ala. 411; Logansport v. Dick, 70 Ind. 65; Detroit v. Corey, 9 Mich. 165; Hincks v. Milwaukee, 46 Wis. 559; Butler v. Bangor, 67 Me. 385; Blake v. St. Louis, 40 Mo. 569; Baltimore v. Pennington, 15 Md. 385; Nashville v. Brown, 9 Heisk. (Tenn.) 1; Watson v. Tripp, 11 R. I. 98; Mayor v. Railroad Co., 49 N. Y. 657. Compare Painter v. Pittsburg, 46 Pa. St. 221; Barry v. St. Louis, 17 Mo. 121; Westchester v. Apple, 35 Pa. St. 284; Erie v. Caulkins, 85 Pa. St. 247.

In an action against a city for injuries alleged to have been sustained by the plaintiff from falling into a sewer, which work was let out to a contractor, the defendant sought to avoid liability on two grounds: 1. The contractor was the only party liable. 2. The charter provided that the city should not be liable for any damages arising from the bad condition of its streets, from neglect to repair the same, until a certain officer should have been notified thereof and failed to repair the same within a reasonable time: *Held*, that neither plea presented any defense to the action; that the provision in the charter had no application to the case stated; that in permitting the sewer to be constructed in a dangerous manner was the cause of the injury, and the city was liable.[9]

Contributory Negligence of the Plaintiff a Question for the Jury.—When different conclusions may well and reasonably have been made from the evidence, on the question of contributory negligence of the plaintiff, the court will not decide the question as a matter of law, but will submit it to the jury as a matter of fact. If the facts are not controverted, yet if there is a reasonable ground for different conclusions, the jury is to decide as to the contributory negligence of the plaintiff. This is a question for the jury in all cases except where the facts are undisputed, and the inference to be deduced from them is clear and certain.[10]

When the facts are undisputed, and but one inference can be deduced in regard to the case of the plaintiff, it is a question of law for the determination of the court.[11]

Sometimes the question of contributory negligence is a mixed question of law and fact.[12] It is the duty of the court to tell the jury what facts, if proved, will constitute contributory negligence, and explain the rule of proximate cause.[13] When the court has thus instructed the jury, they must determine the facts and then apply the law as laid down.[14]

What is Sufficient Notice to the City.—In the principal case it is laid down that where the liability of the city is made to depend on its negligence to keep its streets in repair, and the question of negligence is dependent on notice to the city of the existence of some defect or obstruction causing the injury; that where an agent, or *quasi* agent, of the city creates the defect by an authorized act, the law imputes notice to the employer.

What is sufficient notice, and what is necessary to imply it, is a question not susceptible of harmonious solution from the decisions of the courts. In absence of notice, or the existence of the defect for such a time as to imply notice or establish negligence, the corporation is not liable except when the doctrine of the principal case applies.[15] But the doctrine of the principal case shows that the city is liable when the duty of maintaining the streets in a safe condition is especially imposed on it; therefore, when a dangerous improvement is made, and there is negligence on the part of the contractor under the corporation, it is liable to a person injured thereby, and the law imputes notice to the employer.[16]

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[9] Springfield v. LeClaire, 49 Ill. 476.

[10] Railroad Co. v. Stout, 17 Wall. (U. S.) 657; City Council v. Wright, 72 Ala. 411; Eureka Co. v. Bass, 81 Ala. 200; s. c., 60 Am. Rep. 152; North Penn. R. Co. v. Heileman, 49 Pa. St. 60; Cooley on Torts, 666; Whart. on Neg. § 420; Beach on Cont. Neg. § 163; Hathaway v. Railroad Co., 29 Fed. Rep. 469; 1 Thomp. on Neg. 401; Jochem v. Robinson, 66 Wis. 638; Detroit v. Van Steinburg, 17 Mich. 99; Fernandes v. Railroad Co., 52 Cal. 45; Hart v. Railroad Co., 80 N. Y. 622; Boss v, Railroad Co. (R. I.), 21 Am. & Eng. R. R. Cas. 364; Pierce on Railroads, 311; Patterson's Ry. Acc. L. §§ 382-384.

[11] Filer v. Railroad Co., 49 N. Y. 47; Reading R. Co. v. Ritchie, 102 Pa. St. 425; Beach on Cont. Neg. § 162; Pierce v. Whitcom, 48 Vt. 127; s. c., 21 Am. Rep. 120; Todd v. Railroad Co., 3 Allen, 18; s. c., 80 Am. Dec. 49, and note; Indianapolis v. Cook, 99 Ind. 10; Larmore v. Iron Co., 101 N. Y. 391; Merrill v. North Yarmouth, 78 Me. 200; s. c., 57 Am. Rep. 794; Talman v. Railroad Co., 98 N. Y. 198; s. c., 23 Am. & Eng. R. R. Cas. 313; Schofield v. Railroad Co., 114 U. S. 615; Baker v. Fehr, 97 Pa. St. 70; Railroad Co. v. Greiner (Pa.), 28 Am. & Eng. R. R. Cas. 397.

[12] Fernandes v. Railroad Co., 52 Cal. 45; Trow v. Railroad Co., 24 Vt. 487; Beach on Cont. Neg. § 161; Wharton on Neg. § 420; Railroad Co. v. Terry, 8 Ohio. St. 570.

[13] Railroad Co. v. State, 36 Md. 366; Railroad Co. v. Whitfield, 44 Miss. 466; Montgomery v. Wright, 72 Ala. 411; s. c., 47 Am. Rep. 422; Pleasants v. Faut, 22 Wall. 121; Detroit v. Van Steinburg, 17 Mich. 118; Pierce on Railroads, 322; Cumberland R. Co. v. State, 37 Md. 157; Bigelow's Lead. Cas. on Torts, 580.

[14] Thompson on Neg. 1235, § 10; Pierce on Railroads, 311. For the general doctrine of negligence the lawyer must consult works devoted to that subject: Contributory Negligence, annotated case, see 26 Cent. L. J. 103.

[15] Market v. St. Louis, 56 Mo. 189; Moore v. Minneapolis, 19 Minn. 300; Atlanta v. Perdue, 53 Ga. 607; Higert v. Greencastle, 43 Ind. 574; Chicago v. Langlass, 66 Ill. 381; Boucher v. New Haven, 40 Conn. 456; Furnell v. St. Paul, 20 Minn. 117; Barnes v. Newton, 46 Iowa, 567; Studly v. Oshkosh, 45 Wis. 380; Morrill v. Portland, 4 Cliff. C. C. 138; Hays v. New York, 74 N. Y. 264; Farrell v. Oldtown, 69 Me. 72; Noble v. Richmond 31 Gratt. (Va.) 271; Perkins v. Fayette, 68 Me. 152; Weightman v. Washington, 1 Black. (U. S.) 39; Lindholm v. St. Paul, 19 Minn. 245; Castor v. Uxbridge, 39 U. C. (Q. B.) 113; Prindle v. Fletcher, 39 Vt. 257; Hart v. Brooklyn, 36 Barb. 226; Davis v. Plank Road, 27 Vt. 602; Reed v. Northfield, 13 Pick. (Mass.) 94.

[16] Storrs v. Utica, 17 N. Y. 104; Detroit v. Corey, 9 Mich. 165; Brusso v. Buffalo, 90 N. Y. 679; Springfield v. Le Claire, 49 Ill. 477; 20 Cent. L. J. 383; also 163, § 7.

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1. APPEAL—Attachment—Bill of Exceptions— Review. ——The order of a justice discharging or refusing to discharge an attachment will be reviewed by the court of common pleas upon a bill of exceptions. If the bill of exceptions shows that the only question is upon the weight of evidence the case will not be reviewed by the supreme court. — *Seville v. Wagner*, S. C. Ohio, Oct. 16, 1888; 18 N. E. Rep. 480.

2. APPEAL—Bond—Time of Filing.— Under Colorado law, when the time for filing a bond on appeal from the county court, as allowed by the court, has expired, the court may at any time during the same term extend such time. — *Pennington v. McNally*, S. C. Colo., Oct. 26, 1888; 19 Pac. Rep. 503.

3. APPEAL—Justices—Questions.——In California, an appeal on questions of law and fact from a justice's judgment, there having been no trial on issues of fact, must be entertained and decided by the superior court as on questions of law alone.—*Fabretti v. Superior Court*, S. C. Cal., Oct. 29, 1888; 19 Pac. Rep. 481.

4. APPEAL—New Trial—Uncontradicted Evidence.—— Where the killing of stock is shown by the uncontradicted testimony of its employees not to have been caused by the negligence of the railroad, a verdict for the plaintiff should be set aside. — *Georgia R. & R. Co. v. Wall*, S. C. Ga., Jan. 30, 1888; 7 S. E. Rep. 659.

5. APPEAL—Record—Abstract.——When the abstract fails to show that an appeal was taken, the case will be dismissed.—*Schooley v. Globe Ins. Co.*, S. C. Iowa, Oct. 27, 1888; 40 N. W. Rep. 104.

6. APPEAL—Record— Errors. —— An assigned error, that the court erred in denying a motion to strike out an amended answer, where the motion to strike out, and the exceptions to the ruling of the court thereon, are not preserved in the bill of exceptions, will not be considered on appeal. — *Whitney v. Teichfuss*, S. S. Colo., Oct. 26, 1888; 19 Pac. Rep. 507.

7. APPEAL—Record—Errors. —— The overruling of a motion to strike out certain allegations in a replication, and the giving of instructions requested by the appellee, cannot be considered on appeal without a bill of exceptions. — *Brink v. Posey*, S. C. Colo., Oct. 16, 1888; 19 Pac. Rep. 467.

8. APPEAL—Record — Instructions. —— Instructions cannot be considered on appeal, where no transcript of the evidence has been filed.—*State v. Daniels*, S. C. Iowa, Oct. 29, 1888; 40 N. W. Rep. 109.

9. APPEAL—Weight of Evidence.——Where there is a conflict in the evidence, and the verdict is not manifestly against the weight of the evidence, the verdict of the jury will not be disturbed.— *McGrath v. Bassick*, S. C. Colo., Oct. 16, 1888; 19 Pac. Rep. 462.

10. ASSIGNMENT—Assignee — Commissions — Interest. —— An assignee is not entitled to commissions on a sale which he did not effect, although he had the power to sell but refrained from doing so at the request of the assignor. An assignee is liable for interest on money remaining in his hands which he did not invest, although he had authority to do so. — *Appeal of Hower*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 687.

11. ATTACHMENT— Intervention. —— A, president of a company, at its request advanced $500 to a contractor. The contract was countermanded and A gave an order for the balance of the $500 not earned. This balance was attached as a debt due the corporation: *Held*, that A could not claim this balance as his money. — *Sanders v. Page*, S. C. Colo., Oct. 16, 1888; 19 Pac. Rep. 468.

12. BILLS AND NOTES—Actions — Consideration. —— Parol evidence that defendant signed the note, after refusing the maker, at the request of the payee on a promise that he should not be held upon it, is admissible to show want of consideration in a suit by the payee.— *Kulenkamp v. Groff*, S. C. Mich., Oct. 19, 1888; 40 N. W. Rep. 57.

13. BILLS AND NOTES—Consideration—Fertilizers.—— Where the maker is sued on his note for the purchase of commercial fertilizers, no waiver or covenant will bar him, under Georgia law, from pleading the want of legal inspection. — *Faircloth v. DeLeon*, S. C. Ga., July 11, 1888; 7 S. E. Rep. 640.

14. BILLS AND NOTES—Parol Contract.—Parol evidence is inadmissible to show that when a promissory note was executed it was agreed, that if the maker should be forced to assign the payee should file his claim with the assignee and execute a full release. — *Harrison v. Morrison*. S. C. Minn., Nov. 2, 1888; 40 N. W . Rep. 66.

15. BOND—Constable—Action.——A constable's bond, as tax-collector, given to a town, should be prosecuted in the name of the town or its commissioners. — *Town of Warrenton v. Arnington*, S. C. N. Car., Oct. 15, 1888; 7 S. E. Rep. 652.

16. CARRIERS—Delays — Strikes. —— A railroad company is not liable for losses caused by delayed freights, where the cause of delay was an organized strike and resistance, which neither the railroad company nor the civil authorities, which were called upon, could control. —*Haas v. Kansas City, etc. R. R.*, S. C. Ga., Oct. 10, 1888; 7 S. E. Rep. 629.

17. CARRIERS—Passengers—Alighting from Train.—— It is error to charge, that what would be a reasonable time for a man to alight from a train would not be a reasonable time for an aged lady, that being a question for the jury. — *St. Louis, etc. R. R. v. Burns*, S. C. Tex., Oct. 19, 1888; 9 S. W. Rep. 467.

18. CARRYING WEAPONS— Penitentiary Guard. —— A penitentiary guard, not in the lawful discharge of his duty as such guard on the premises of the penitentiary, nor going nor returning to or from a place for the purpose of obtaining ammunition for his weapon, is liable, under the Texas law, for carrying weapons.—*West v. State*, Tex. Ct. App., Oct. 10, 1888; 9 S. W. Rep. 485.

19. CERTIORARI—Railroad Company — Street Crossing —Statute. —— Construction of Massachusetts statutes relative to street crossings on railroads, the duty of county commissioners in relation thereto, the remedy for errors by *certiorari* or otherwise, and rulings as to costs incurred in such proceedings. — *Old Colony, etc. Co. v. City of Fall River*, S. J. C. Mass., Oct. 19, 1888; 18 N. E. Rep. 425.

20. CHAMPERTY — Deed — Adverse Possession. —— A conveyance of land in the actual adverse possession of a third person under claim of title is champertous and void. — *Combs v. McQuinn*, Ky. Ct. App., Nov. 3, 1888; 9 S. W. Rep. 495.

21. CONSTITUTIONAL LAW—Corporation— Obligation of Contracts—Water Company. —— Where a water company had a right by charter to take water by pipes for the use of a city from a particular pond for domestic and other purposes, it is nevertheless competent for the legislature to authorize another company to take water for the same purposes in the same city from the same pond, the grant to the first company not being exclusive; the obligation of no contract is impaired by such second grant.—*Rockland, etc. Co. v. Camden, etc. Co.*, S. J. C. Me., Nov. 3, 1888; 15 Atl. Rep. 785.

22. CONTRACT—Contemporaneous Writings.—— Papers executed at the same time, or acted upon cojointly, together constitute the contract and ascertain the respective relations and obligations of the parties to it.— *Kitchen v. Grandy*, S. C. N. Car., Oct. 22, 1888; 7 S. E. Rep. 563.

23. CONTRACT—Deed—Escrow.—— In an action on a written contract to sell land, to be paid for in part by other land, defendant may show by parol, that the papers executed were placed in the hands of a third person, to be delivered when defendant's wife should assent to the transaction and his attorney approve plaintiff's title. — *Dikeman v. Arnold*, S. C. Mich., Oct. 19, 1888; 40 N. W. Rep. 42.

24. CONTRACTS—Writing — Parol Variation. —— One who proposes to erect a building, and employs an architect by written contract to draw up plans and superintend the work, cannot show by parol that the building was not to be erected and the architect not to

be paid, unless a loan could be procured. — *Marquis v. Lauretson*, S. C. Iowa, Oct. 27, 1888; 40 N. W. Rep. 73.

25. CONSTRUCT—Construction. —— A agreed to sell B all the fruit grown in a certain year on a farm, a portion of the purchase price was to be paid when the crop is taken off at the end of the year: *Held*, that the end of the fruit season was meant, and not the end of the calender year. — *Brown v. Anderson*, S. C. Cal., Oct. 23, 1888; 19 Pac. Rep. 487.

26. CORPORATIONS—Claims — Directors. —— When a claim has been approved by the directors of a corporation acting separately, as was their custom, this is a sufficient approval in the absence of any law or by-law restricting the directors to a different mode.— *Longmont S. D. Co. v. Coffman*, S. C. Colo., Oct. 26, 1888; 19 Pac. Rep. 508.

27. CORPORATION — Contract — Public Policy — Ultra Vires— Restraint of Trade. —— A contract made by a steamship company with the owner of a competing line, by which they agreed to pay him a certain sum monthly in consideration of his withdrawing his competition, is not *ultra vires* nor against public policy, nor in restraint of trade. —*Leslie v. Lorillard*, N. Y. Ct. App., Oct. 16, 1888; 18 N. E. Rep. 363.

28. COSTS—Intoxicating Liquors—Search.——A search-warrant is served by making the search, and the officer is entitled to his fee, under Iowa law, though no intoxicating liquor for which the warrant was issued is found. — *Byram v. Polk Co.*, S. C. Iowa, Oct. 27, 1888; 40 N. W. Rep. 102.

29. COST — Trespass — Statute. —— Circumstances stated under which it was held that a party was not entitled to costs in a case of trespass under the Code Civil Proc. N. Y. § 3228. — *Dunster v. Kelly*, N. Y. Ct. App., Oct. 16, 1888; 18 N. E.R ep. 361.

30. COSTS—Who Entitled.—— Where the main object of a suit was to restrain the threatened sale of property named in a trust deed and for an accounting, costs may be awarded to the plaintiff, he being the successful party. — *Beckwith v. Beckwith*, S. C. Colo., Oct. 26, 1888; 19 Pac. Rep. 510.

31. COUNTIES—Organization— Registering Deeds.—— Archer county was not attached to Clay for any purpose in August, 1875, and that the registration in the latter county, of a deed of land situated in the former, was not constructive notice.— *Alford v. Jones*, S. C. Tex., Oct. 23, 1888; 9 S. W. Rep. 470.

32. CRIMINAL LAW—Appeal—Demurrer.—— The overruling of a demurrer to an indictment is not ground for a new trial, but can be considered on a bill of exceptions. — *Flemister v. State*, S. C. Ga., Oct. 5, 1888; 7 S. E. Rep. 642.

33. CRIMINAL LAW—Appeal—Transcript—Record.—— The statute of Massachusetts does not prescribe the time when, in a criminal case, the transcript of the record shall be filed in the appellate court. It is sufficient if it be filed at any time during the next succeeding term in the county before the defendant is called on to plead. — *Commonwealth v. McPherson*, S. J. C. Mass., Nov. 13, 1888; 18 N. E. Rep. 417.

34. CRIMINAL LAW—Appeal from Justice— Bond. —— An appeal bond, conditioned that the defendant shall prosecute her appeal with effect, and shall pay such fine and costs as shall be adjudued against her by the county court, as well as other costs that may be adjudged against her in the court below, complies with Texas law.—*Elkins v. State*, Tex. Ct. App., Oct. 24, 1888; 9 S. W. Rep. 491.

35. CRIMINAL LAW—Assault—Intent.——In an assault, which is commonly called a simple assault, if there is no present purpose and no present ability to do an injury, there is no assault. — *People v. Dodel*, S. C. Cal., Oct. 27, 1888; 19 Pac. Rep. 484.

36. CRIMINAL LAW—Assault to Murder—Variance.—— Conviction may be had under an indictment for assault with intent to murder, alleged to have been committed with a gun, though the assault was committed with a pistol.— *Douglass v. State*, Tex. Ct. App., Oct. 10, 1888; 9 S. W. Rep. 489.

37. CRIMINAL LAW—Challenge—Tax-roll.—— When a challenge to a juror by the State, because his name was not on the assessment roll, it not appearing whether the juror was on the regular panel or not, has been allowed by the court, the judgment will not be reversed for this cause.—*State v. Harding*, S. C. Oreg., Oct. 23, 1888; 19 Pac. Rep. 449.

38. CRIMINAL LAW — Change of Venue — Costs. —— When a change of venue is taken in a criminal case, the county where the case is tried is primarily liable for the costs, under Iowa law, which costs must be finally paid by the county from which the change was taken.— *Lockhart v. Montgomery Co.*, S. C. Iowa, Oct. 27, 1888; 40 N. W. Rep. 104.

39. CRIMINAL LAW — Disorderly House. —— A combined retail grocery store and beer saloon, frequented by prostitutes and vagabonds for the purpose of drinking beer, is not a disorderly house, under Pen. Code Tex., art. 339. — *Harmes v. State*, Tex. Ct. App., Oct. 20, 1888; 9 S. W. Rep. 487.

40. CRIMINAL LAW—Former Jeopardy. —— A conviction for manslaughter reversed on appeal does not sustain pleas of former acquittal and once in jeopardy on a retrial for murder. — *People v. Carty*, S. C. Cal., Oct. 23, 1888; 19 Pac. Rep. 490.

41. CRIMINAL LAW—Grand Jury—Filling Vacancies.—— Under Iowa law, where one of seven jurors, selected for the grand jury from those appearing, is discharged before the jury is impaneled, the court may order the sheriff to select one of those not drawn to take his place.—*State v. Gurlagh*, S. C. Iowa, Oct. 30, 1888; 40 N. W. Rep. 141.

42. CRIMINAL LAW—Highway—Obstruction.—— When the evidence shows that, when defendant built his fence, which was alleged to an obstruction, he honestly believed it was upon his own land as the survey indicated, a conviction for obstructing a public road cannot stand. — *Parsons v. State*, Tex. Ct. App., Oct. 20, 1888; 9 S. W. Rep. 490.

43. CRIMINAL LAW—Homicide— Justifiable. —— Where there was evidence of deceased's criminal intimacy with defendant's wife, that defendant had requested him to leave her alone, and that just before the killing he went with her up a dark alley, it is for the jury to say whether the killing is justifiable. — *Cloud v. State*, S. C. Ga., Oct. 17, 1888; 7 S. E. Rep. 641.

44. CRIMINAL LAW — Indictment — Prostitution. —— Under Iowa law, on an indictment charging a count for enticing a virtuous female to a house of ill-fame, and another for concealing or assisting to conceal a female so enticed, and another count charging both offenses, judgment cannot be rendered on a general verdict of guilty.—*State v. Terrill*, S. C. Iowa, Oct. 31, 1888; 40 N. W. Rep. 128.

45. CRIMINAL LAW — Jurisdiction — Ordinances. —— Under the Colorado constitution, the criminal courts have no jurisdiction of a prosecution for violating a city ordinance in carrying on the business of ticket brokerage without a license.— *Garland v. City of Denver*, S. C. Colo , Oct. 16, 1888; 19 Pac. Rep. 460.

46. CRIMINAL LAW — Juror — Prejudice. —— It is not ground for a new trial, that a juror, who had stated on his *voir dire* that he had no prejudice against defendant and could render an important verdict, was subsequently discovered to have stated before the trial that he believed the defendant guilty, because two jurors had found him guilty.—*Blackman v. State*, S. C. Ga., June 5, 1888; 7 S. E. Rep. 626.

47. CRIMINAL LAW—Larceny—Trick.——If possession of goods is obtained by a trick, artifice, or false pretenses, with the felonious intent on the part of the accused to convert them to his own use, he is guilty of larceny.— *State v. Hall*, S. C. Iowa, Oct., 27, 1888; 40 N. W. Rep. 107.

48. CRIMINAL LAW- Opening Statement. ——The trial court may permit the prosecuting attorney to open the

argument by merely stating his propositions of law without discussing his theories as to the facts.— *State v. Anderson*, S. C. N. Car., Oct. 22, 1888; 7 S. E. Rep. 678.

49. CRIMINAL LAW— Reception of Evidence. —— Under Texas law, the trial court may in its discretion, after the close of the testimony by both the State and the defendant, allow the State to introduce a witness to corroborate a former witness. — *Farris v. State*, Tex. Ct. App., Oct. 10, 1888; 9 S. W. Rep. 487.

50. CRIMINAL LAW—Sentence — Less Penalty. —— A sentence, on a conviction for illegal sale of intoxicating liquor, imposing a fine, and in default of payment imprisonment, being lighter than it might have been, cannot be complained of by the offender. — *People v. Rouse*, S. C. Mich., Oct. 19, 1888; 40 N. W. Rep. 57.

51. CRININAL LAW — Separation of Jury. —— A temporary separation of the jury, one of the jurors remaining in the jury-room in charge of an officer while the others are at supper, is not, as matter of law, ground for a new trial. — *Commonwealth v. Gagle*, S. J. C. Mass., Nov. 12, 1888; 18 N. E. Rep. 417.

52. CRIMINAL LAW—Trial—Attorney Assisting.—— On appeal, when the facts are not before it, the appellate court will not say that the court abused its discretion in allowing an attorney to assist the county attorney in the prosecution.— *State v. Shinner*, S. C. Iowa, Oct. 30, 1888; 40 N. W. Rep. 144.

53. DEDICATION— Street — Acceptance. —— The conveyance of land within a town by deed, describing the land as bounded by certain designated streets, if projected, and designated as being a quarter of a certain block, as laid down on the official map of said town, together with five years' use of the projected streets by the public, constitutes a complete dedication of such streets to public use without a formal acceptance by the town. — *City of Eureka v. Craghan*, S. C. Cal., Oct. 27, 1888; 19 Pac. Rep. 485.

54. DEED—Description—Uncertainty. —— A deed describing the land conveyed as all the lands contained in patent No. 383, vol. 15, first class, to me granted by the State of Texas, that have not been legally sold or disposed of for location, the above lands being situated and lying in the county of W, and fully described in patent which accompanies this deed, is not void for uncertainty. — *Falls L. & C. Co. v. Chrisholm*, S. C. Tex., Oct. 23, 1888; 9 S. W. Rep. 479.

55. DEED—Escrow—Delivery. —— A mortgagor agreed to execute a deed to the mortgagee and deliver it to a third person, to be delivered to the mortgagee on default by him in paying an agreed sum less than the mortgage, provided the mortgagee receipted in full. He made default, demanded back his deed, which he did not review, and conveyed the land to A, who knew the facts. The holder delivered the deed to the mortgagee's attorney, who executed a receipt in full: *Held*, that the delivery was binding on the mortgagor and his grantee took no title.—*McDonald v. Huff*, S. C. Cal., Oct. 24, 1888; 19 Pac. Rep. 499.

56. DESCENT AND DISTRIBUTION — Intestate Leaving only Nieces and Nephews.——Under the provisions of Mansf. Dig. Ark. § 2522, that if an intestate leave surviving him neither children, father nor mother, his estate shall descend to his brothers and sisters, or their descendants, in equal parts, the nephews and nieces of intestate, his father and mother, brothers and sisters being dead, take *per capita*, and the children of a deceased nephew or niece take *per stirpes*. — *Garrett v. Bean*, S. C. Ark., Oct. 27, 1888; 9 S. W. Rep. 435.

57. DIVORCE — Custody of Children. —— When a divorce is decreed, the care of the minor children should be given to the party not in fault, unless it is manifestly improper so to do and a special finding of fact made by the court to that effect.—*Lambert v. Lambert*, S. C. Oreg., Oct. 11, 1888; 19 Pac. Rep. 459.

58. DIVORCE—Setting Aside— Evidence—Witness—Impeachment—New Trial. —— Where a husband fraudulently obtains a divorce from his wife by causing the petition to be filed in her name, such divorce will be set aside upon her petition, and she is a competent witness for that purpose. Newly-discovered evidence which only tends to impeach a witness is not ground for a new trial. — *Brown v. Grove*, S. C. Ind., Oct. 25, 1888; 18 N. E. Rep. 387.

59. DOWER—Homestead—Election.—— Until the distributive share is set apart, the widow, by occupying homestead, will be regarded as having elected to take it, under Iowa law. — *McDonald v. McDonald*, S. C. Iowa, Oct. 30, 1888; 40 N. W. Rep. 126.

60. DRAINAGE—Assessment— Jurisdiction—County.—— Upon petition in one county for a ditch leading into another county, the county court of the former county has jurisdiction to have it constructed in the latter county and to assess for the costs thereof lands in the latter county.—*Hudson v. Bunch*, S. C. Ind., Oct. 24, 1888; 18 N. E. Rep. 390.

61. EASEMENT—Railways— Right of Way. —— Where a right of way is condemned solely for the passage of trains and not for switching and making up trains, by A company, which leaves it to B company, which by agreement uses it in common with D company, A and B companies are liable for damages sustained from the unlawful use of it by D company in switching and making up trains. — *Backus v. Detroit, etc. R. R.*, S. C. Mich., Oct. 19, 1888; 40 N. W. Rep. 60.

62. EASEMENT—Right of Way—Construction. —— Construction of a conveyance by which the grantor reserved a right of way over the land conveyed: *Held*, that the grantor had by virture of that reservation and under the terms of that instrument, no right of way over another lot subsequently sold to the same grantee, not having reserved that right in the conveyance of the latter lot.— *Leach v. Hastings*, S. J. C. Mass., Oct. 19, 1888; 18 N. E. Rep. 405.

63. EJECTMENT—Mesne Profits — Improvements. —— Under Iowa law, on a petition by an occupying claimant for allowance for improvements after judgment for plaintiff, in an action to recover the land the plaintiff is entitled to a counterclaim for the use and occupation prior to his judgment.— *Wells v. Newsom*, S. C. Iowa, Oct. 27, 1888; 40 N. W. Rep. 105.

64. ELECTION—County Officers — Justice of the Peace. ——A justice of the peace is a county officer, under the election laws of New Jersey. — *State v. Clark*, S. C. N. J., Nov. 12, 1888; 15 Atl. Rep. 831.

65. ELECTIONS — Illegal Voting. —— Knowledge of a person voting that he has been convicted of an assault with intent to murder is equivalent to the knowledge that he is not a qualified voter.— *Thompson v. State*, Tex. Ct. App., Oct. 10, 1888; 9 S. W. Rep. 486.

66. EMINENT DOMAIN—Compensation— Streets.—— A railroad, lowering the grade of a street to adjust it to its tracks, is liable to an adjacent lot owner injured thereby, as for land taken for the company's use, though none of the lot itself is taken.—*Shealy v. Chicago, etc. R. R.*, S. C. Wis., Oct. 8, 1888; 40 N. W. Rep. 145.

67. EMINENT DOMAIN—Wharves— Statute. —— Under the statutes of New York, the owner of the bulk-head may maintain an action against the city for building a bulk-head in front of his, thereby destroying his wharf privileges, unless the city pays or tenders to him the proper compensation. — *Kingsland v. Mayor*, N. Y. Ct. App., Oct. 26, 1888; 18 N. E. Rep. 435.

68. EQUITY—Damages—Assessment. —— In chancery to restrain further detention of land, damages for injury already received may be determined by reference to the master. — *Busby v. Mitchell*, S. C. S. Car., Oct. 19, 1888; 7 S. E. Rep. 618.

69. EQUITY — Rescission of Contract — Mistake. —— Where it was the intention of both grantor and grantee that the conveyance should be of land on which stood a building, and that was the main inducement to the purchase, but by mutual mistake as to its location the conveyance did not include it, the grantee is entitled to a rescission.—*Barth v. Deuel*, S. C. Colo., June 1, 1888; 19 Pac. Rep. 471.

70. EQUITY PLEADING — Abatement of Action. —— A

party who has sued in his own name for his own interest and has parted with his interest, cannot prosecute the suit thereafter. Where a plea is filed which goes to the whole equity of the bill, and afterwards a motion is made by which the truth of the plea is conceeded, the plea will be held to be allowed. Statement of the difference between a bill in the nature of a revisor and a supplemental bill. Where an original complainant has assigned his interest his assignee must proceed to litigate the case by an original bill in the nature of a supplemental bill. — *Fulton v. Greacen*, N. J. Ct. Chan., Nov. 9, 1888; 15 Atl. Rep. 827.

71. EVIDENCE—Parol—Writings.—— A written agreement to raft certain logs properly for towing, the price to be paid on delivery to the towing vessel, cannot be varied by showing a parol contemporaneous agreement, that the logs were not to be rafted until the purchaser furnished the necessary rafting gear.—*Meekins v. Newberry*, S. C. Car., Oct. 15, 1888; 7 S. E. Rep. 655.

72. EVIDENCE—Writings—Parol.——Parol evidence is admissible to show that the time specified in the written contract for the completion of machinery was regarded as essential, and also to show that the purchase of cotton seed in advance, in order to have the same ready for the manufacture of oil by that time, was contemplated. — *Van Winkle v. Wilkins*, S. C. Ga., May 2, 1888; 7 S. E. Rep. 644.

73. ESTOPPEL—Corporation— Stockholder — Contract. Circumstances stated under which a stockholder of a corporation, who was under a contract to supply cans to it, is estopped from denying the title of a purchaser of fruit from that corporation. — *Kilgore v. Smith*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 698.

74. EXECUTION— Sale — Redemption — Equity — Evidence. —— Circumstances stated under which it was held that there was no sufficient evidence before the court that the purchaser at an execution sale had promised the defendant that he might redeem the property, and that the bill for that purpose must be dismissed. — *Maloney v. Herbert*, N. J. Ct. Chan., Nov. 8, 1888; 15 Atl. Rep. 824.

75. EXECUTORS—Claims—Sureties. —— B became administrator of A with C as surety. B was removed for squandering the estate. C was appointed and charged with the penalty of B's bond. C died and D was appointed, who filed a claim as such for the full amount of B's bond against C's estate: *Held*, that C's liability could only be determined by settling his account as A's administrator *de bonis non*, and charging him with the balance after allowing all just credits.—*Brown v. Jacobs*, S. C. Neb., Oct. 31, 1888; 19 Pac. Rep. 137.

76. EXECUTOR—Commissions—Contract.—— An agreement by executors, on taking possession of the estate, that the commissions for their services should be divided equally among them, is a valid contract npon sufficient consideration. The fact that the work was chiefly done by one of the executors is immaterial. — *John v. John*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 675.

77. EXECUTOR — Fraud — Bona Fide Purchaser. —— Fraud between the administrator and his immediate vendee will not effect subsequent purchasers who are such *bona fide* and for value, and who derive title through his deed without notice of the fraud.— *King v. Cabaniss*, S. C. Ga., Oct. 3, 1888; 7 S. E. Rep. 620.

78. EXECUTORS AND ADMINISTRATORS — Accounting — Investment— Conversion. —— Where an executor invested the money of the testatrix in the stock of a bank for which she had expressed a preference, and the stock by mistake was made in the name of the executor personally: *Held*, that he was not liable for the loss on the stock, there being no conversion.—*Appeal of Pensyl*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 719.

79. EXECUTORS AND ADMINISTRATORS— Bond — Action Upon Bond. —— Where the letters of one admistrator are revoked, execution issued against him and returned *nulla bona*, the bond may be sued upon by the other admistrator, although it is a joint bond given with sureties by both administrators.—*Sperb v. McCona*, N. Y. Ct. App., Oct. 26, 1888; 18 N. E. Rep. 441.

80. EXECUTOR AND ADMINISTRATOR — Parties — Accounting. —— Where an executor, having different amounts of money in his hands to invest for the benefit of several different persons, who makes one investment including all the funds, and ultimately converts the whole to his own use: *Held*, that all the beneficiaries of the several trusts are necessary parties to a proceeding for an accounting by him.—*Deegan v. Capner*, N. Y. Ct. Chan., Nov. 8, 1888; 15 Atl. Rep. 819.

81. EXECUTORS AND ADMINISTRATOS— Sale of Lands to Pay Debts — Title. —— Construction of Massachusetts statutes relative to the sale of land by an administrator to pay the debts of the intestate, the notice to be given of an application for license to make such sale, who may oppose such sale: *Held*, that the administrator can only sell the title of the decedent, and that no question of his title was involved or could be raised. — *Walker v. Fuller*, S. J. C. Mass., Oct. 19, 1888; 18 N. E. Rep 400.

82. HIGHWAY—Sidewalk— Defects — Town. —— Circumstances stated under which it was held that a town is liable for a defective sidewalk when it had, or might have had, notice of such defect. — *Noyes v. Inhabitants, etc. Co.*, S. J. C. Mass., Oct. 19, 1888; 18 N. E. Rep. 423.

83. HOMESTEAD—Business—Extent.—— Where A becomes insolvent and makes an assignment, but continues to use his business house for a business he carries on, such house and the two lots, on part of both of which it stands, are exempt from execution as a business homestead, under Texas law. — *Hargadine v. Whitfield*, S. C. Tex. Oct. 19, 1888; 9 S. W. Rep. 475.

84. HOMESTEAD — Illegal Levy — Damages. —— The facts that land claimed as a homestead is not paid for, that claimant has made a conditional sale of it which has failed, and that after the levy on crops thereon he has reconveyed it to his vendor, do not interfere with his right to exemption nor to damages for the levy. — *Lee v. Welborne*, S. C. Tex., Oct. 19, 1888; 9 S. W. Rep. 471.

85. HOMESTEAD— Mortgage — Wife's Signature. —— Under Wisconsin law, a mortgage of a homestead by a married man, without his wife's signature, is void, though at the time she is living apart from him.—*Herron v. Knapp S. & Co.*, S. C. Wis., Oct. 8, 1888; 40 N. W. Rep. 140.

86. HUSBAND AND WIFE—Conveyance—Private Examination. —— The private examination of an infant married woman as to her execution of a deed is, under North Carolina law, not conclusive, and does not bar any right of dower she might have in the lands conveyed.—*Eppo v. Flowers*, S. C. N. Car., Oct. 22, 1888; 7 S. E. Rep. 680.

87. FERRY—Franchise— Construction. —— Construction of Pennsylvania statutes relative to a ferry across the Susquehanna river at the town of Sunbury. — *Sunbury v. Grant*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 706.

88. FISHERIES—Nets— Constitutional Law. —— Code N. C. § 3383, prohibiting the setting or fishing of a dutch or pod net in certain rivers, is constitutional. — *Rea v. Hampton*, S. C. N. Car., Oct. 15, 1888; 7 S. E. Rep. 619.

89. FRAUD — Confidential Relations. —— A, who had been B's confidential business adviser, urged B to invest in a new enterprise, representing that certain property purchased for the purpose cost $20,000, when in realty it cost $14,000. On that basis B invested and secured a one-third interest in the corporation formed for the purpose, paying more than the other two-thirds cost A and another: *Held*, that the representation was actionable. — *Teachout v. Van Hoesen*, S. C. Iowa, Oct. 30, 1888; 40 N. W. Rep. 96.

90. FRAUDS — Statute of — Promise to Pay Debt of Another.——Circumstances stated under which it was held that if the testimony of the plaintiff was to be believed the defendants were liable upon an original contract to pay for the printing of a book, and that they did not promise to pay the debt of another, and

that the statute of frauds did not apply. — *Greenough v. Eichholtz*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 712.

91. FRAUDS—Statute of— Sale — Coal. —— Defendant cannot, in an action for the price of coal, recoup damages for breach of a contract to furnish him coal during the season, when the only evidence of his contract under the statute of frauds is a letter in July from him, accepting an oral offer, to which defendant sent a reply refusing to furnish certain coal he desired.—*Delaware & H. Co. v. Roberts*, S. C. Mich., Oct. 19, 1888; 40 N. W. Rep. 53.

92. FRAUDULENT CONVEYANCES — Bills in Equity — Merger.—— The grantee in a fraudulent conveyance, who purchases subsequent judgments against his grantor, while suits are pending thereon to subject such property thereto, acquires the lien created by the institution of such suits, and such lien is paramount to a lien acquired by another creditor bringing a similar suit.—*Fordyce v. Hicks*, S. C. Iowa, Oct. 25, 1888; 40 N. W. Rep. 79.

93. FRAUDULENT CONVEYANCE— Bona Fide Purchaser. —— Though a deed to A is fraudulent and void as to creditors, a conveyance by A to B for valuable consideration without notice of the fraud would be valid, although B knew of the levy of the attachment lien. — *Morrow v. Graves*, S. C. Cal., Oct. 22, 1888; 19 Pac. Rep. 489.

94. FRAUDULENT CONVEYANCES — Judgment — Collateral Attack. —— In an action to enforce a judgment against property in the hands of the debtor's grantee, the grantee cannot show that service in the action, wherein it was obtained, was accepted in another State, when the acceptance itself does not so show. — *Wright v. Mahaffey*, S. C. Iowa, Oct. 29, 1888; 40 N. W. Rep. 112.

95. FRAUDULENT CONVEYANCE — Mortgage. —— Circumstances stated under which it was held that a mortgagor retaining possession and carrying on business on the mortgaged premises, partly in the name of the mortgagee and partly on his own account, rendering no account, and admitting that the object of the mortgage was to secure the property from his creditors, is guilty of fraud, and that the conveyance was fraudulent. — *Decker v. Wilson*, N. J. Ct. Chan., Nov. 2, 1888; 15 Atl. Rep. 816.

96. FRAUDULENT CONVEYANCES— Mortgages — Possession.——A sold a stock of goods to B, taking B's notes secured by a mortgage on the goods, which provided, that B should carry on the business and pay A within a reasonable time from the proceeds. Nothing showed that the mortgage was executed in bad faith or to secure an antecedent debt, and in a few months B paid more than $600 on the debt: *Held*, that the evidence rebutted any presumption of fraud, because B had possession of and sold the goods, and in violation of his agreement bought other goods and intermingled them with these.—*Kreth v. Rogers*, S. C. Car., Oct. 22, 1888; S. E. Rep. 682.

97. INDEMNITY—Contract—Construction—Surety.—— Where a surety or indorser is indemnified by a mortgage to secure him against his liability on certain named notes, executed by his principal and against liability on the removal of those notes: *Held*, that under the terms of the agreement the surety was entitled to indemnity from the mortgage against his liability on a note which was outstanding when the mortgage was executed. — *Appeal of Lancaster Nat. Bank*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 697.

98. INDICTMENT—Statute—Burden of Proof—Physician. —— An indictment which charges an offense in the language of the statute is sufficient. An indictment charging that defendant practiced medicine without a license is sustained by proof showing that he practiced medicine within two years. The burden of proof to show that he had a license is upon the defendant.—*Benham v. State*, S. C. Ind., Nov. 9, 1888; 18 N. E. Rep. 454.

99. INFANT—Contract—Disaffirmance.—— Thirty two days after attaining majority is a reasonable time within which a contract made in infancy may be disaffirmed, under Iowa law. — *Leacox v. Griffith*, S. C. Iowa, Oct. 29, 1888; 40 N. W. Rep. 109.

100. INJUNCTION—Injunction Bond— Bond — Waste — Mistake. —— Where an injuction is issued to restrain the defendant from committing waste on land to which he makes no claim, and of which he is not in possession, the land being misdescribed by mistake, no action will lie upon the injunction bond.—*Kulp v. Bowen*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 717.

101. INNKEEPERS—Liens—Stable-keeper.—— A livery stable-keeper, who is also an innkeeper, and who fails to show that the owner of horses, which he has kept and cared for, was his guest, cannot set up the innkeeper's lien at common law. — *Wall v. Garrison*, S. C. Colo., Oct. 16, 1888; 19 Pac. Rep. 469.

102. INSOLVENCY—Fraudulent Conveyance. —— Construction of the insolvent laws of Massachusetts, and circumstances stated under which it was held to be a question for the jury, whether, under the evidence the case came within the statute of Massachusetts, ch. 157, § 98, which provides that sales not in the ordinary course of business should be *prima facie* evidence that the purchaser believed in the contemplated insolvency of the seller.—*Stevens v. Pierce*, S. J. C. Mass., Oct. 19, 1888; 18 N. E. Rep. 411.

103. INSURANCE—Life— Application. —— An application for insurance, with a warranty of truthfulness, stated that B, the beneficiary, was the applicant's cousin. Upon the refusal of insurance A wrote in the name of B, and, on his authority, that B was a creditor and dependant on A. The policy was then issued. It was found that B was a creditor but not dependant on A: *Held*, that the letter was not a part of the application, but admissible on the question of fraud in procuring the insurance. — *Mace v. Provident L. I. Ass'n.*, S. C. N. Car., Oct. 22, 1888; 7 S. E. Rep. 674.

104. INSURANCE—Mutual Benefit—Waiver. —— A mutual benefit association issuing a certificate, with a provision avoiding it in case the insured injured his health by the use of stimulants, with the right to cancel it during his life for such action, to a person known to its agent to be a confirmed drunkard, waives its right to defend an action on the certificate on that ground. — *Newman v. Covenant M. B. Ass.*, S. C. Iowa, Oct. 26, 1888; 40 N. W. Rep. 87.

105. INSURANCE—Mutual Insurance—Membership.—— Circumstances stated under which it was held that a party who had taken out a policy on his barn in a mutual insurance company and paid the premium thereon was a member of the company. — *Farmers', etc. Co. v. Mylin*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 710.

106. INSURANCE—Waiver—Estoppel.——An insurance company is estopped from setting up the failure of the policy to state certain facts required to be stated if they existed, where the company's agent, when issuing the policy, knew that the facts existed.— *Crescent Ins. Co. v. Camp*, S. C. Tex., Oct. 19, 1888; 9 S. W. Rep. 473.

107. INTOXICATING LIQUORS—Evidence — Illegal Sales. ——Upon a prosecution for illegal sale of liquors, evidence that one of the purchasers was seen to give money to one M was admitted, but the jury were properly instructed that they should disregard it unless they were satisfied that M and the defendant were confederates—*Commonwealth v. McDonald*, S. J. C. Mass., Oct. 19, 1888; 16 N. E. Rep. 402.

108. INTOXICATING LIQUORS— Illegal Sale — Evidence. ——Circumstances stated under which it was held that there was sufficient evidence of an illegal sale of liquor against the defendant to go to the jury.— *Commonwealth v. Murphy*, S. J. C. Mass., Oct. 19, 1888; 18 N. E. Rep. 403.

109. INTOXICATING LIQUORS — Illegal Sales —Prosecution.——Any person may prosecute for violation of the law prohibiting illegal sales of liquors, although it is made a special duty of certain public officers to do so. —*Commonwealth v. Murphy*, S. J. C. Mass., Nov. 12, 1888; 18 N. E. Rep. 418.

110. INTOXICATING LIQUORS—Judicial Cognizance.—— Alcohol is, as matter of law, an intoxicant.— *Snider v. State*, S. C. Ga., Oct. 17, 1888; 7 S. E. Rep. 631.

111. INTOXICATING LIQUORS— Transportation—Permit.

——Under Code Iowa, § 1553, the driver of a team, for one who undertakes with his own wagons to deliver intoxicating liquors without the certificate of the county auditor, is punishable. — *State v. Campbell*, S. C. Iowa, Oct. 30, 1888; 40 N. W. Rep. 100.

112. IRRIGATION — Rights of Riparian Owners.—— A valid appropriation of the waters of a stream, to the exclusion of a riparian owner, may be made for the purpose of irrigation, though the lands to be irrigated are not located on the banks or in the neighborhood of the stream.—*Hammond v. Rose*, S. C. Colo., Oct. 16, 1888; 19 Pac. Rep. 466.

113. JUDGMENT—Amendment—County Court. —— In a term case the county court may, upon the motion of a party to the action, upon due notice to the adverse party, amend a docket entry to conform to the facts.—*Grimes v. Grosjean*, S. C. Neb., Oct. 31, 1888; 40 N. W. Rep. 137.

114. JUDGMENT — Default — Excusable Neglect. —— When a defendant sent to an insolvent attorney in another part of the State the necessary papers for his defense, who allowed judgment to go against him for want of a verified answer, the defendant not having consulted with his attorney, nor being aware of such requirement, the default was set aside.— *Gwathmey v. Savage*, S. C. N. Car., Oct. 15, 1888; 7 S. E. Rep. 661.

115. JUDGMENT—Dismissal on Demurrer. —— A dismissal of a petition on demurrer for want of merits, the plaintiff refusing to amend, is an adjudication of all matters pleaded, or which could or should have been pleaded in the petition to entitle plaintiff to the relief therein prayed.—*Lamb v. McConkey*, S. C. Iowa, Oct. 26, 1888; 40 N. W. Rep. 77.

116. JUDGMENT—Impeachment.——A domestic judgment may be impeached in an action thereon by evidence that, at the time the suit was brought in which it was recovered, defendant therein was a non-resident of the State and had no notice of its commencement or pendency.—*Needham v. Thayer*, S. J. C. Mass., Oct. 22, 1888; 18 N. E. Rep. 429.

117. JUDGMENT — Res Adjudicata—Divorce.——Where, by the decree in a divorce suit, it is adjudged that certain funds in a bank belonged to the wife, the husband cannot maintain an action against the bank for such funds, the ownership of them being *res adjudicata*.—*Glaze v. Citizens', etc. Co.*, S. C. Ind., Nov. 9, 1888; 18 N. E. Rep. 450.

118. JUDGMENT—Res Adjudicata—Partition—Appeal.—Where a proceeding for partition had been decided by the trial court, and the judgment set aside and appeal taken to an appellate court, and a second proceeding for partition instituted, the judgment in the first case is no bar to the second petition; it is not *res adjudicata* until after the reversal of the decree in the first case.—*Appeal of Small*, S. C. Penn., Oct, 1, 1888; 15 Atl. Rep. 807.

119. JURISDICTION— Appearance.——By appearing in the county court and entering on the trial on the merits, a defendant gives that court complete jurisdiction of the action.—*Reed v. Cates*, S. C. Colo., Oct. 16, 1888; 19 Pac. Rep. 464.

120. JUSTICE OF THE PEACE—Appeal—Dismissal.—— Under Colorado law, the filing of the transcript on appeal from a justice in the appellate court is necessary to give the latter sufficient jurisdiction to warrant a dismissal of the appeal.—*Denver, etc. R. Co. v. Rader*, S. C. Colo., Oct. 16, 1888; 19 Pac. Rep. 476.

121. LANDLORD AND TENANT—Abatement and Revivor —False Representations—Evidence.——An action can be maintained by the lessee against the lessor for falsely representing that the house leased was healthy. Such actions survive upon the death of the plaintiff to his representatives. Evidence is admissible in such cases as to the condition of the drainage of the house before, at and after the execution of the lease.—*Cutter v. Hamlen*, S. J. C. Mass., Oct. 19, 1888; 18 N. E. Rep. 397.

122. LANDLORD AND TENANT—Denial of Title. —— Plaintiff having proved the execution of a lease and defendant's possession under it, defendant cannot deny plaintiff's title or set up an outstanding title in another.—*Eckles v. Booco*, S. C. Colo., Oct. 16, 1888; 19 Pac. Rep. 465.

123. LANDLORD AND TENANT— Lease.——A company erected certain buildings on its land, where B boarded its men, furnishing the houses and paying the company rent. The company deducted from the pay of their men the board they owed, paying to B the amount, after deducting the rent due to it: *Held*, that this amounted to a lease, and the possession of the buildings was in B.—*Lightbody v. Truelsen*, S. C. Minn., Nov. 2, 1888; 40 N. W. Rep. 67.

124. LANDLORD AND TENANT—Lease—Possession.—— A lessee who is unable to obtain possession on account of a prior parol lease, may sue the lessor upon an implied covenant for quiet and peaceable possesion.—*Brennan v. Jacobs*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 685.

125. LANDLORD AND TENANT—Release—Discharge.—— A contract between lessor and lessee, by which they release and relieve one another from all the terms and obligations of the lease, releases an obligation of the lessee to pay taxes not then due or payable, though previously assessed.—*Henry v. Chrisinger*, S. C. Iowa, Oct. 30, 1888; 40 N. W. Rep. 121.

126. LICENSE — Parol License — Revocation — Limitations—Easement.——A parol agreement between the owner of a spring and another that the latter may take all water necessary for domestic purposes from the spring, is a mere license, and may be revoked by the grant to a third person of the right to take all the water in the spring by pipes. But if the licensee continues to use the spring according to the terms of his license for twenty years his easement is complete, and he may continue to use the water.—*Eckerson v. Crippen*, N. Y. Ct. App., Oct. 26, 1888; 18 N. E. Rep. 443.

127. LIENS—Landlords—Crops—Priority.——A mortgagor in possession after condition broken cannot give a lien on the crop superior to all others, under Code N. C. § 1799, and when he subsequently takes a lease from the mortgagee, the lien of the latter on the crops, under § 1754, takes precedence.—*Brewer v. Chappell*, S. C. N. Car., Oct. 22, 1888; 7 S. E. Rep. 670.

128. LIMITATIONS —Suits — Return of Summons.—— Under Kentucky law, where a summons was issued and served within the period of limitation for the action, but cited defendant to appear at the next term, which commenced within ten days, and a continuance was had to the following term, which was after the period of limitation had expired, the statute of limitations is no bar to the action.—*Louisville, etc. R. Co. v. Smith*, Ky. Ct. App., Oct. 27, 1888; 9 S. W. Rep. 493.

129. LOGS—Intermingling — Compensation. —— The Wisconsin law, giving compensation to an owner for driving logs, which have become intermingled with his own, includes bailees, under the term owner, and it is immaterial whether the intermingling occurred at the beginning of or during the drive.— *Wisconsin, etc. A. v. Comstock L. Co.*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 146.

130. LOST INSTRUMENT—Averment — Evidence.——In an action on a lost note, it is sufficient to aver that the note is lost; there need be no averment that diligent search had been made; that is a matter of evidence. An allegation that defendant had failed to pay the note in work, as he had agreed to do, is a sufficient averment that the note was unpaid when the suit was brought.—*Douthit v. Mohr*, S. C. Ind., Nov. 9, 1888; 18 N. E. Rep. 449.

131. MASTER AND SERVANT — Fellow-servant — Negligence. —— Construction of Massachusetts statutes giving to a servant injured by the negligence of a fellow-servant an action against the master for such negligence. Circumstances stated under which no action can be maintained.—*Ashley v. Hart*, S. J. C. Mass., Oct. 29, 1888; 18 N. E. Rep. 416.

132. MASTER AND SERVANT—Negligence—Jury. —— A was sent by his employer to remove one of its electric lamps and connect the wires with the circuit. He knew nothing about such work. While he was so en-

gaged the electric current was turned on earlier than was its custom: *Held*, that a nonsuit was properly refused, the questions of negligence and contributory negligence being for the jury.—*Colorado E. Co. v. Lubbers*, S. C. Colo., Oct. 16, 1888; 19 Pac. Rep. 479.

133. MECHANIC'S LIEN—Apportionment. —— Circumstances stated under which it was held that where work was done on an entire contract there could be no apportionment, although two parties were interested, and consequently there could be no lien.—*Cahill v. Capen*, S. J. C. Mass., Oct. 19, 1888; 18 N. E. Rep. 419.

134. MISTAKE—New Trial —Amendment — Record. —— When a mistake has been committed in the trial court in a case originating before a trial justice, on appeal a new trial will be granted in order that the trial justice may amend the record.—*Commonwealth v. LeClaire*, S. J. C. Mass., Oct. 22, 1888; 18 N. E. Rep. 428.

135. MORTGAGE—Judgment — Res Adjudicata. —— A party, who was made a party to foreclosure proceedings for the purpose of settling his liability, and did not show to the court his suretyship, as required by law, in order not to be considered equally liable with the principal debtor, is bound by the decree.—*Case v. Hicks*, S. C. Iowa, Oct. 25, 1888; 40 N. W. Rep. 75.

136. MORTGAGE — Possession—Growing Crops.——In North Carolina, a mortgagee is entitled to possession and the crops produced on the land till the debt is paid, in the absence of any contrary agreement, and his rights are not abridged by a clause expressly providing that the crops shall not be removed in any year until the installment for that year is paid.—*Coor v. Smith*, S. C. N. Car., Oct. 22, 1888; 7 S. E. Rep. 669.

137. NEGLIGENCE—Action—Instruction.——Where, in an action for damages for the death of plaintiff's minor son, the court charged the jury that if plaintiff knew that the work in which the son was engaged was dangerous, he was guilty of contributory negligence, but added "I refer you to the general charge," the general charge was that if the defendant failed to apply suitable appliances the jury should ascertain plaintiff's damages: *Held*, that the general charge was erroneous, because it withdrew the question of negligence from the jury.—*Schwenk v. Kehler*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 694.

138. NEGLIGENCE—Contributory Negligence.——Circumstances stated under which it was held that a person well acquainted with the usual manner of switching cars, who stepped from the track and was injured by a train, was guilty of contributory negligence.—*Ohio, etc. Co. v. Hill*, S. C. Ind., Nov. 10, 1888; 18 N. E. Rep. 461.

139. NEGLIGENCE— Contributory Negligence.——Circumstances stated under which it was held that a person killed by the falling of a car from a trestle had been guilty of contributory negligence, and his representative could not recover damages.—*Carroll v. Pennsylvania, etc. Co.*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 688.

140. NEGLIGENCE—Evidence—Admissibility.—— In an action against a railroad, where the evidence is conflicting as to whether there was a low joint on the track, by which the engine was derailed, it is competent to show that defendant's employees raised the joint immediately after raising the engine.—*Kuhns v. Wisconsin, etc. R. Co.*, S. C. Iowa, Oct. 26, 1888; 40 N. W. Rep. 92.

141. NEGLIGENCE—Implied Negligence — Corporation. ——A woman, who was invited to ride in a vehicle by the owner thereof, cannot be charged with his alleged negligence, when she sues the city on account of injuries suffered by reason of an obstruction negligently left in the street.— *Town of Knightstown v. Musgrove*, S. C. Ind., Nov. 9, 1888; 18 N. E. Rep. 452.

142. NEGLIGENCE — Jury. —— Circumstances stated in which it was held that the question whether a mining company was liable to the plaintiff for injuries received in consequence of the alleged negligence of the company's servant was for the jury. — *Ebright v. Mineral, etc. Co.*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 709.

143. NEW TRIAL—Appeal.——A question of law available, but not raised, at the trial cannot be raised on motion for a new trial; no appeal lies from an order of the superior court overruling a motion for a new trial. —*Holdsworth v. Tucker*, S. J. C. Mass., Oct. 29, 1888; 18 N. E. Rep. 430.

144. NEW TRIAL—Statutory Right. —— Under the Indiana statutes the defeated party in ejectment case is entitled as of right to a new trial within a year: *Held*, that this statute applies to a case in which it is sought to revest in the grantor the title of land which he had been induced by fraud to convey. — *McKittrick v. Glenn*, S. C. Ind., Oct. 23, 1888; 18 N. E. Rep. 388.

145. PARENT AND CHILD—Labor of Children.—— Where some of the children acquire property for themselves and the other children under an agreement with the parents that it shall belong to the children, and not to the family generally, is not liable for the debts of the children.—*Bener v. Edgington*, S. C. Iowa, Oct. 29, 1888; 40 N. W. Rep. 117.

146. PARTNERSHIP—Frauds—Individual Creditors.—— A partner who admits that he has in his hands money which he has drawn out of the firm, cannot hold it subject to possible claims of creditors of the firm as against his own creditors, but may be required to deliver it to a receiver in a proceeding by creditor's bill.—*Hamilton v. Harris*, S. C. Mich., Oct. 19, 1888; 40 N. W. Rep. 56.

147. PATENTS—Agreement for Assignment— Construction.——The terms of a contract stated under which the obligor was held to be bound to transfer the obligee all his patents granted or applied for, and all his improvements, *i. e.*, inventions made by his subsequently to the date of the contract upon the same subject-matter. The contract held also to include all reissues and renewals. Equity will enforce the performance of such a contract.—*Appeal of Reese*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 807.

148. PLEDGE—Conversion—Ratification.—— Where a pledgee converts the pledge by selling it without public notice and buying it himself, the pledgor, if he does not within a reasonable time after notice, disaffirm the sale, loses his right to do so. — *Hill v. Finigan*, S. C. Cal., Oct. 24, 1888; 19 Pac. Rep. 494.

149. PLEADING— Assault — Demurrer. —— A petition alleging that defendant unlawfully assaulted plaintiff, thereby putting him in great fear, but not stating how the assault was made, is demurrable. — *Stivers v. Baker*, Ky. Ct. App., Oct. 30, 1888; 9 S. W. Rep. 491.

150. PLEADINGS— Certiorari — Judgment. —— Where on demurrer to a petition for *certiorari* it is decided that the appointment of a guardian *ad litem* for minor parties is not necessary to the validity of a judgment in a will contest, an answer that defendant court set aside the judgment because no guardian had been appointed for the minors, presents no material question of fact, and petitioners may have judgment on the pleadings.—*Carpenter v. Superior Court*, S. C. Cal., Oct. 27, 1888; 19 Pac. Rep. 500.

151. PLEADING—Default—Answer.——The motion for leave to answer after default was properly denied, since the delay of five months was not satisfactorily excused, and the proposed answer set up no facts constituting a defense. — *St. Paul L. Co. v. Dayton*, S. C. Minn., Nov. 1888; 40 N. W. Rep. 66.

152. PLEADING—Defenses — Tender. —— In an action against a railroad for killing stock, a tender of damages pleaded as a distinct defense admits that the company ought to have fenced, though a general denial in another count covers such issue, and though Iowa law authorizes inconsistent defenses. — *Taylor v. Chicago, etc. R. R.*, S. C. Iowa, Oct. 30, 1888; 40 N. W. Rep. 84.

153. POWERS—Testamentary— Execution. —— Under Wisconsin law, an authority given to the executor to sell land and convert it into money must be executed by all, and equity will not enforce a contract of sale made by two only —— *Crowley v. Hicks*, S. C. Wis., Oct. 8, 1888; 40 N. W. Rep. 151.

154. PRACTICE— Parties — Assignment. —— Where a bond is assigned to A at the instance and request of B,

who pays the consideration, A holds it in trust for B, and a subsequent assignee occupies the same relation and is the real party in interest to sue on the bond. — *Grant v. Heverin*, S. C. Cal., Oct. 24, 1888; 19 Pac. Rep. 493.

155. PRACTICE—Verdict—General or Special.— Under Colorado law, in an action for the recovery of money only, it is a matter within the discretion of the jury as to whether they shall render a general or special verdict. — *Thompson v. Gregor*, S. C. Colo., Oct. 16, 1888; 19 Pac. Rep. 461.

156. PRINCIPAL AND AGENT—Power—Insurance.——A general district agent of an insurance company for a stated territory, whose duties are to solicit and forward applications for insurance at a stated compensation, has no authority to bind the company for furniture purchased for his office. — *Beebe v. Equitable M. L. & E. Ass.*, S. C. Iowa, Oct. 30, 1888; 40 N. W. Rep. 122.

157. PUBLIC LANDS—State Lands— Navigable Waters—Land Commissioners. —— Under the statute of New York, the land commissioners may grant so much public land lying under navigable waters as they may think required for the uses of commerce. An appeal from the judgment of the supreme court relating to such grants to the court of appeals may be taken by the commissioner, but not by the successful party.— *People v. Jones*, N. Y. Ct. App., Oct. 9, 1888; 18 N. E. Rep. 432.

158. RAILROADS—Lease—Liability.—— A railroad company cannot, by leasing its road, avoid liability to a shipper of freight for loss, caused by fire at a depot, where no authority for such lease is conferred by statute.—*International, etc. R. R. v. Moody*, S. C. Tex., Oct. 30, 1888; 9 S. W. Rep. 465.

159. RAILROAD COMPANIES — Bridges. —— A railroad company cannot be required, under the laws of Pennsylvania, to construct a bridge across a deep cut to enable the owner of the land the more easily to reach the highway. — *Traut v. New York, etc. Co.*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 678.

160. RAILROAD COMPANIES—Killing Stock— Measure of Damages.——Where a railroad company had engaged to place a cattle-guard upon plaintiff's premises, he may maintain an action for the value of cattle killed by reason of the failure of a compony to maintain such cattle-guard. In such case the measure of damages is the value of cattle so killed. — *Chicago, etc. Co. v. Barnes*, S. C. Ind., Nov. 10, 1888; 18 N. E. Rep. 459.

161. RAILROAD COMPANY—Lease — Injury to Property. —— Construction of a lease of a railway and appentenant lands including such as might thereafter be acquired and used as depot grounds, etc. *Held*, that this lease did not include lands afterwards condemned but not put to use as depot grounds, and that the city was liable for injuries done to such lands by lowering the grade of an adjacent street.—*Norwich, etc. Co. v. City of Worcester*, S. J. C. Mass., Oct. 19, 1888; 18 N. E. Rep. 409.

162. RECEIVER—Recovery of Property—Pleading.—— Where a receiver files a petition, alleging that the officers of the company are about to dispose of, and convert to their own use a note belonging to the company, and are insolvent, which petition is entitled as though it were a part of the original action, the court can require defendants to answer and to surrender the note. — *Brandt v. Allen*, S. C. Iowa, Oct. 26, 1888; 40 N. W. Rep. 82.

163. REFERENCE—Exceptions—Jury Trial.—— A jury trial on exception to all the findings of the referee on the issues of fact, where there was a compulsory reference, is properly denied, under North Carolina law. — *Yelverton v. Coley*, S. C. N. Car., Oct. 22, 1888; 7 S. E. Rep. 672.

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181. TAXATION—Sales—Separate Tracts. ——A certificate of tax-sale construed as showing on its face that several distinct tracts of land were sold together for one gross sum and, therefore, held void. — *Brown v. Setzer*, S. C. Minn., Nov. 2, 1888; 40 N. W. Rep. 70.

182. TAXATION—Standing Timber.——Standing timber, owned separately from the land, is to be assessed, under Michigan laws, as realty. — *Fletcher v. Town of Alcona*, S. C. Mich., Oct. 19, 1888; 40 N. W. Rep. 36.

183. TRESPASS TO TRY TITLE—Improvements.——Defendant in trespass to try title cannot be allowed his claim for improvements, under Texas law, when plaintiff and defendant claim under the same immediate source of title, and defendant took possession, but about two months before the action was brought. —*Whitaker v. Allday*, S. C. Tex., Oct. 30, 1888; 9 S. W. Rep. 483.

184. TROVER AND CONVERSION — Husband and Wife — Evidence.——A warehouseman who has surrendered to the executors of a husband property stored with him by the wife, may set up against her the title of the husband. In such case a widow cannot testify as to transactions with her husband.—*Mullins v. Chickering*, N. Y. Ct. App., Oct. 16, 1888; 18 N. E. Rep. 877.

185. TRUST—Attorney and Client— Fees. —— Circumstances stated under which it was held that, where an engagement is made with an attorney to transact the professional business of the plaintiff, and he does so for many years, attending to their affairs during complicated litigation, and discharging the duties of trustee under a trust deed involving the property in question, he is entitled to fees for his services during the whole series of transaction, and the liability of the plaintiff for his fees was not interrupted or modified by the trust.—*Babcock v. Hubbard*, S. C. E. Conn., June 26, 1888; 15 Atl. Rep. 791.

186. TRUST—Constructive Trust— Attorney and Client. ——An attorney, who in the course of his professional employment, discovers a flaw in his client's title to property, and buys up the outstanding title, cannot maintain an action against his client, because he holds the title under a constructive trust for the benefit of his client. — *Downard v. Hadley*, S. C. Ind., Nov. 10, 1888; 18 N. E. Rep. 457.

187. TRUSTS—Grantee—Consideration.—— A trust results in favor of one who pays the consideration for land, which is deeded to another, and his right to recover the title and possession is not dependant upon an express agreement of the latter to convey to him. — *Burns v. Ross*, S. C. Tex., Oct. 23, 1888; 9 S. W. Rep. 468.

188. TRUSTS—Resulting—Bona Fide Purchasers.——In an action to establish a resulting trust in land sold for taxes, and to recover the land or its value, no relief can be had against a purchaser for value and without notice of plaintiff's claim from the sheriff's vendee.—*Richardson v. Haney*, S. C. Iowa, Oct. 29, 1888; 40 N. W. Rep. 115.

189. TRUST—Will—Construction—Estate. —— A devise to trustees directing them to pay the income to the beneficiary, a widow, who has no apparent intention of marriage, creates a mere passive trust, and if there is no limitation over, entitles the widow to an absolute conveyance.—*Appeal of Rodrigue*, S. C. Penn., Oct, 1, 1888; 15 Atl. Rep. 680.

190. WATER AND WATER-COURSES — Ponds. —— The "Colony Ordinance," 1641-47 (Ancient Charters and Laws, 148), providing that householders shall have free fishing and fowling in any great ponds, bay, etc., within the precincts of the town, and may pass and repass on foot through any man's land, so that they trespass not on corn or meadow land, and that no town shall appropriate any great pond to any particular person, establishes a rule of property throughout the State of Massachusetts, vesting in it both the *jus privatum* and *jus publicum*, in the great ponds, and the legislature can appropriate their waters to public uses, without making compensation to owners of land on natural streams flowing therefrom. — *Watuppa, etc. Co. v. City of Fall River*, S. J. C. Mass., Oct. 29, 1888; 18 N. E. Rep. 465.

191. WILL—Attestation—Execution.——The attesting witnesses of a will must sign the attestation clause in the presence of the testator, and must then see the testator's signature. It is not sufficient if they sign the clause without seeing the signature, although he tells them that the paper is his will.—*In re Mackay's Will*, N. Y. Ct. App., Oct. 26, 1888; 18 N. E. Rep. 433.

192. WILL—Construction—Validity—Remoteness —— Where a testator bequeathed the rents and profits of an estate to N for life, and after her death to her children for life, and as her children should die the estate to go to the heirs at law of N, as each child shall die after the death of N his proportion shall go to his children, said N's grandchildren to take *per stirpes: Held*, that the limitation over to the grandchildren of N was not void for remoteness, but that the estate vested in the grandchildren who were living at the death of the testator, subject to the life interest of N, and that upon the death of any one of the grandchildren, after the testator's death and the death of N, his share should be divided among his heirs at law. — *Dorr v. Lovering*, S. J. C. Mass., Oct. 22, 1888; 18 N. E. Rep. 412.

193. WILL—Divise—Shelley's Case. ——A devise to a daughter during her natural life, and after her death to the begotten heirs or heiresses of her body, creates an estate-tail, which, under North Carolina law, is a fee-simple.—*Leathers v. Gray*, S. C. N. Car., Oct. 15, 1888; 7 S. E. Rep. 657.

194. WILL—Estate—Accumulation.——A will granting an estate to the testator's daughter and providing that the interest should be left to accumulate during the life of her husband, vests in her an absolute estate in the funds and its accumulations at the expiration of twenty-one years after the testator's death.—*Appeal of Brubaker*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 708.

195. WILLS—Execution — Witness. —— Under North Carolina law, an attesting witness, who is also an heir at law and propounder of the will, may testify in his own behalf as to its validity. — *Collins v. Collins*, S. C. N. Car., Oct. 22, 1888; 7 S. E. Rep. 687.

196. WILL—Witness—"His Mark."——Under the statute law of Arkansas (Mansf. Dig. § 6344), which authorizes the signature by mark of a witness to a will, who cannot write his name, the mark of an attesting witness is valid if proved by the person who wrote the signature to which the mark is attached, although such person has not signed his own name as witness of the fact that the attesting witness had made his mark. — *Davis v. Semmes*, S. C. Ark., Oct. 27, 1888; 9 S. W. Rep. 434.

197. WITNESS—Contradictory Statements. —— A party may on direct examination, for the purpose of refreshing the recollection of his witness, inquire if he has not at another time testified to facts inconsistent with his present testimony.—*State v. Cummins*, S. C. Iowa, Oct. 30, 1888; 40 N. W. Rep. 124.

198. WRIT—Return—Error. —— An officer's return of a warrant is no part of the record, and the mistake therein is no ground for arrest of judgment. — *Commonwealth v. Russell*, S. J. C. Mass., Oct. 22, 1888; 18 N. E. Rep. 418.

199. WRITS—Return— Impeachment.——The return of an officer of the service of a summons is not conclusive upon the defendant, but may be impeached by affidavit upon motion or other direct proceedings in the action to set aside the judgment or default. —*Crosby v. Farmer*, S. C. Minn., Nov. 2, 1888; 40 N. W. Rep. 71.

200. WRITS—Service — Return. —— Under Colorado laws, a return dated at the office of the sheriff of the county of defendant's residence, stating that the summons was served personally by delivering a copy to defendant, and signed by the sheriff by his deputy, is sufficient.—*Thomas v. Colorado N. Bank*, S. C. Colo., Oct. 16, 1888; 19 Pac. Rep. 501.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERY NO. 15.

A and B agreed to run a horse race for $500 a side, the winner to take the whole. The race was run. A's horse won. After the race, but before the money was paid over by C (the stakeholder), B demanded his $500; C refused to pay to him, but paid the whole $1,000 to the winner, A. B brought suit against C, the stakeholder, to recover his $500. C answered, setting up the above facts, and alleged that B agreed to abide the decision of the judges of the race; that the race was won by A, and was so decided by said judges, and after said decision in A's favor, C held the money when B's demand was made, as the money of A. To this answer B demurred. The circuit court at Portland, Oreg., sustained the demurrer, holding "that, notwithstanding the statutes of Oregon are silent on the subject, the 'wager' is illegal, and contrary to public policy. That demand being made before the money was actually paid over, though after the event, B could recover." Please cite authorites holding: 1st. That in the absence of any statute to that effect, the "wager" is not illegal or against public policy. 2d. That after the event (*i. e.*, after the race was run and decided), it is loo late to rescind or recover the money staked and lost. On the second proposition New York, Texas and California have so held as to elecelon bets.

N. H. B.

QUERIES ANSWERED.

QUERY NO. 13 [*27 Cent. L. J. 564.*]

A plaintiff in trespass introduced a land contract showing that he had an equitable title, and is to get a warranty deed upon making certain monthly payments aggregating $1,500. Subsequently on the trial he offered a warranty deed of the same property, between the same parties, but bearing date on a day subsequent to the commencement of the action. The form of the complaint in alleging title is the same as in ejectment cases, *i. e.*, the plaintiff alleged himself to be the owner and entitled to the possession. It had appeared on the trial previous to this offer, that the land upon which the trespass was committed was a vacant lot. The warranty deed was objected to upon the ground that only facts which were in existence at the time of the commencement of the action were admissible. The court received the deed, stating that he did so with some hesitation, but because the contract already in evidence showed that the plaintiff had sufficient interest in the land to maintain the action, and the only further question to consider was whether the owner of the legal title would have a remedy against the defendant in addition to the one the plaintiff claimed on this title; and that this deed conferring the whole title in the plaintiff was relevant and material. Was the court right? Cite authorities. R.

Answer. It was formerly held that an action of trespass could only be maintained in case the plaintiff was in actual possession of the land when the trespass was committed. Afterwards the owner of unoccupied land was considered to be in constructive possession, and was allowed to bring such a suit. But a *cestui que trust* or a bargainee, not in possession, cannot bring such a suit. Carrine v. Westerfield, 3 A. K. Marsh. 331; 1 Chitty Pl. 71; 6 Wait's Act. & Def. 64-68. The plaintiff, not being in possession, nor the owner of the land when the suit was brought, cannot maintain his action. J. E. B.

RECENT PUBLICATIONS.

FEDERAL DECISIONS. Cases Argued and Determined in the Supreme, Circuit and District Courts of the United States. Comprising the Opinions of those Courts from the Time of their Organization to the Present Date, together with Extracts from the Opinions of the Court of Claims and the Attorneys-General, and the Opinions of General Importance of the Territorial Courts. Arranged by William G. Myer, Author of an Index to the United States Supreme Court Reports; also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri and Tennessee, a Digest of the Texas Reports, and local works on Pleading and Practice. Vol. XXVII. Quantum Meruit—Swamp Lands. St. Louis, Mo.: The Gilbert Book Company. 1888.

We have now before us the twenty-seventh volume of "Federal Decisions," which in all respects is equal to any of its predecessors. We have so often commented on the successive volumes of this series that there is absolutely nothing new to say in commendation of the present issue. We can only repeat what we have so often said, that the collection is one of the most important and valuable that has ever been made; that the work upon it has been done in a style worthy of it, and that the legal profession ought to be under lasting obligations to the editor and publishers of so valuable a compendum of law.

JETSAM AND FLOTSAM.

"PRISONER at the bar," remarked a judge to a forsaken criminal who was about to receive his death sentence, "is there anything you wish to say before sentence is passed upon you?" The prisoner cast a look at the half-open door as he said: "I would like to say 'Good-evening,' if it's agreeable to the company."

SOLICITOR CURRAN, the famous Irish advocate, was once examining a witness who persistently avoided direct answers. Livid with rage, the Irishman declared: "That'll do; that'll do. There's no use asking you questions, for I see the villian in your face." "Oh, do you, now, sir," tauntingly replied the witness. "Faix, I never knew before that my face was a looking-glass."

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In this index all the principal matters are referred to in the volume except those embraced in the Weekly Digest of Recent Cases, to which a separate index has been made, which will be found on page 626. Besides the customary abbreviations, the following are used: ann. cas.—annonated cases; C. E.—Current Events; R. D.—Notes of Recent Decisions; Q. A.—Queries Answered; L. A.—Leading Article.

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Explanation.—This index is prepared upon a new system, which we trust will be found convenient and satisfactory to our readers. It contains a reference under the appropriate heads to every caption in every abstract of all the weekly digests in the volume. It has no cross references, but each caption is directly referred to in the index, the number of the abstract and the page of the JOURNAL on which it appears, is appended to the caption: Thus, for example, "Compromise, 119, 175," indicates that a ruling on the subject of compromise will be found on page 175, in the abstract on that page numbered 119. Where the caption appears in more than one abstract, each abstract is referred to in like manner: Thus, Chattel Mortgage, 29, 30, 556; 35 to 38, 69; indicates that a ruling on chattel mortgages will be found in abstracts Nos. 29, 30, page 556, and also rulings on same subject in each of the abstracts on page 69, numbered from 35 to 38 inclusive. The last number in each reference indicates the page, and the number or numbers preceding it indicates the abstract or abstracts on that page to which reference is made.

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